Supreme Court, U.S.
FILED
JAN 3 1994
OFFICE OF THE CLERK

CASE NO. 93-1191

THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1993 TERM

Ann Brunet and Denise Sachs, on behalf of themselves and the class they represent,
Petitioners,

and

Guy E. Tucker, James T. Meyer, Stuart J. Tudor, and Joseph S. Hilleary, on behalf of themselves and the class they represent,
Respondents,

v.

City of Columbus, Ohio, Columbus Civil Service Commission, Dana Rinehart, Alphonse Montgomery,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Alexander M. Spater
Counsel of Record
Kathaleen B. Schulte
SPATER, GITTES, SCHULTE & KOLMAN
723 Oak Street
Columbus, Ohio 43205
614/221-1160
Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Was the Court of Appeals' use of the strict scrutiny standard in this gender bias case error, in light of this Court's adoption of the intermediate standard for gender bias cases in *Mississippi University for Women v. Hogan*, 458 U.S. 718,724, 102 S.Ct. 3331 (1982)?

2. Did the Court of Appeals contravene the holdings of this Court and other federal appellate courts by holding that the total exclusion of women firefighters until 1975, the use of discriminatory testing procedures between 1980 and 1986, and the gross disparity between the female applicant pool and women on the job did not support a gender conscious consent decree?

3. Is the singular fact that the male Intervenors were hired at the same time as were the female Petitioners sufficient injury under Article III to confer standing on the Intervenors individually and to allow them to represent the unnamed members of the class?

TABLE OF CONTENTS

	page
Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	vi
Official and Unofficial Reports of Opinions in this Case	x
Statement of Jurisdiction	x
The Constitutional and Other Provisions Relied upon	x
Statement of the Case	1
A. *Brunet I:* Judicial Findings of Discrimination	1
B. Evidence of History of Discrimination Against Women	2
1. Written policy against allowing women to apply.	3
2. Thereafter, the City set out to alter its selection procedure to one which it knew would result in severe adverse impact to women applicants and had reason to believe was not job related.	3
3. Under the new selection procedure, implemented after the first women were hired and in use between 1980 and 1986, no women applicants were hired	

page

except pursuant to the Dozier race-based hiring order. 5

4. The selection procedure utilized by the City between 1980 and 1986 was unlawfully discriminatory against women. 5

5. The City's newly designed 1986 PCT was also found to violate Title VII, and the court rejected the City's proposed pass/fail score for the PCT. 6

6. There continues to exist a manifest imbalance of women firefighters. 7

C. *Brunet II:* Tucker Challenge to the Consent Decree 8

Argument

I. The Use of the Strict Scrutiny Standard in this Case Is Error, in Light of the Adoption by this Court and the Second, Fourth, Ninth, and District of Columbia Circuit Courts of Appeal of the Intermediate Standard for Gender Bias Cases. 11

page

II. The Court of Appeals Contravened the Holdings of this Court and Other Federal Appellate Courts by Holding That the Total Exclusion of Women Firefighters, the Use of Discriminatory Testing Procedures Between 1980 and 1986, and the Gross Disparity Between the Female Applicant Pool and Women on the Job Did Not Support a Gender Conscious Consent Decree. 13

A. The Court of Appeals erred in holding that the City's pre-1975 all-male policy was too remote. 15

B. Contrary to the holding of the Court of Appeals, the discriminatory 1980 and 1984 firefighter tests support the gender-conscious consent decree. 18

C. The Court of Appeals erred in rejecting the statistics of a severe imbalance of men and women in the Columbus Division of Fire. 19

D. The Court of Appeals erred in rejecting statistics of significant disparity in test results since 1988. 21

III. The Singular Fact That the Male Intervenors Were Hired at the Same Time as Were the Female Petitioners Is Not Sufficient Injury under Article III to Confer Standing on Them Individually and to Allow Them to Represent the Unnamed Members of the Class. 23

A. The Court of Appeals' finding of a loss of 'competitive status' is not supported by the record. 23

B. The injury determined by the Court of Appeals has not been recognized by federal courts nor this Court. 26

IV. Conclusion 29

TABLE OF AUTHORITIES

CASES page

Billish v. City of Chicago, 989 F.2d 890 (7th Cir.)*(en banc), cert. denied,* __ U.S. __, 114 S.Ct. 290 (1993) 14, 17

Brant v. City of Columbus, Case No. C2-75-425 (S.D.Ohio 1979) 4

Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993) . . . . . *passim*

Brunet v. City of Columbus, 642 F. Supp. 1214 (S.D. Ohio 1986), *appeal dismissed as moot,* 826 F.2d 1062 (6th Cir. 1987), *cert. denied,* 485 U.S. 1034, 108 S.Ct. 1593 (1988) . . . . . *passim*

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S.Ct. 706 (1989) . . 9, 13, 14

Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989) 11

Coral Constr. Co. v. King County, 941 F.2d 910 (9th Cir. 1991), *cert. denied,* __ U.S. __, 112 S.Ct. 875 (1992) 11, 12

Davis v. City and County of San Francisco, 890 F.2d 1438 (9th Cir. 1989) 15, 21

Donaghy v. City of Omaha, 933 F.2d 1448 (8th Cir.), *cert. denied,* __ U.S. __, 112 S.Ct. 938 (1992) 21, 27

page

Dozier v. Chupka, 395 F.Supp. 836 (S.D.Ohio 1975), *inj. dissolved*, 763 F.Supp. 1430 (S.D.Ohio 1991) 3-5, 19

Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S.Ct. 1251 (1976) 26

Hammon v. Barry, 826 F.2d 73 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1036 (1988) 16

Harris v. Forklift Systems, Inc., __ U.S. __, 114 S.Ct. 367 (1993) 12

Howard v. McLucas, 871 F.2d 1000 (11th Cir.), *cert. denied, sub nom*, Poss v. Howard, 493 U.S. 1002, 110 S.Ct. 560 (1989) 15

J.E.B. v. T.B., *cert. granted*, Case No. 92-1239, __ U.S. __, 113 S.Ct. 2330 (1993) 13

Lamprecht v. F.C.C., 958 F.2d 382 (D.C. Cir. 1992) 13

Manufacturers Hanover Trust Co. v. United States, 775 F.2d 459 (2d Cir.), *cert. denied*, 475 U.S. 1095, 106 S.Ct. 1490 (1986) 12

Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331 (1982) . . . . . i, 10, 11

page

Northeastern Florida Contractors v. Jacksonville, __ U.S. __, 113 S.Ct. 2297 (1993) 9, 26, 27

Peightal v. Metropolitan Dade County, 940 F.2d 1394 (11th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 969 (1992) 21

Regents of the University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733 (1978) 26

Stanton v. Stanton, 421 U.S. 7, 95 S.Ct. 1373 (1975) 12

Stuart v. Roache, 951 F.2d 446 (1st Cir.) *cert. denied*, __ U.S. __, 112 S.Ct. 1948 (1992) 15, 19, 21

Tucker, et al v. James, et al., S.D. Ohio Case No. C2-91-616 8

United States v. Commonwealth of Virginia, 976 F.2d 890 (4th Cir.), *cert. denied*, *sub nom*, Virginia Military Institute v. United States, __ U.S. __, 113 S.Ct. 2431 (1993) 12

United States v. DeGross, 960 F.2d 1433 (9th Cir. 1992) 13

United States v. Paradise, 480 U.S. 149, 107 S.Ct. 1053 (1987) 15

Wauchope v. U.S. Dept. of State, 985 F.2d 1407 (9th Cir. 1993) 12

page

Wygant v. Jackson Board of Education, 476 U.S. 267, 106 S.Ct. 1842 (1986) 14

CONSTITUTIONAL AND OTHER AUTHORITIES

United States Constitution, Article III 9, 28

United States Constitution, Fourteenth Amendment 9, 11, 12

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THIS CASE

Brunet v. City of Columbus, 642 F.Supp. 1214 (S.D. Ohio, 1986), *appeal dismissed as moot*, 826 F.2d 1062 (6th Cir. 1987), *cert. denied*, 485 U.S. 1034, 108 S.Ct. 1593 (1988) *("Brunet I")*

Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993) *("Brunet II")*

STATEMENT OF JURISDICTION

On July 28, 1993, the Sixth Circuit Court of Appeals entered its decision affirming the lower court's holding that the consent decree entered into between the Petitioners and Respondent City violated the Fourteenth Amendment to the Constitution. On October 4, 1993, the Sixth Circuit Court of Appeals denied Petitioners' Request for Rehearing and Suggestion of Rehearing *en banc*.

This Court has jurisdiction to entertain this Petition pursuant to 28 U.S.C. §1254(1).

THE CONSTITUTIONAL AND OTHER PROVISIONS RELIED UPON

United States Constitution, Article III, Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all

Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

United States Constitution, Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Brunet I: Judicial Findings of Discrimination

The underlying action was filed against the City of Columbus, Respondent herein, in 1984 by a group of unsuccessful female firefighter applicants seeking to enjoin use of hiring practices which discriminated against women applicants. Following trial in February, 1986, the district court held for the plaintiffs, Petitioners herein, finding that the City had discriminated against female applicants on account of their sex, enjoined the City from utilizing the discriminatory physical capability test ("PCT") used for selection between 1980 and 1986, and enjoined use of strict rank order selection as discriminatory. *Brunet v. City of Columbus,* 642 F. Supp. 1214 (S.D. Ohio 1986), *appeal dismissed as moot,* 826 F.2d 1062 (6th Cir. 1987), *cert. denied,* 485 U.S. 1034, 108 S.Ct. 1593 (1988) (hereinafter "*Brunet I*"). The district court ordered the Respondent to design a non-discriminatory PCT and cut-score for use on scoring the PCT. In place of strict rank order selection, the district court gave the City the choice between attempting to validate ranking and scoring on a pass/fail basis. *Id.*, 642 F.Supp. at 1250.

Following the above order, the City presented a newly designed PCT in 1986 for approval by the district court and proposed a multiple cut-score, as required by the court's order. Again, the court found the test was discriminatory as designed. However, the court held that if one of the six physical events was eliminated, the PCT would be sufficiently job-related under Title VII. *Brunet I*, slip op., May 21, 1987. In addition, the lower court rejected the City's proposed

cut-score and adopted instead a cut-score based upon Petitioners proposed compensatory model. *Id.* The district court did not disturb its earlier injunction against rank order selection.

Additional appeals were filed by both parties from the district court's order. Sixth Cir. App. Nos. 87-3612 and 87-3645. While these appeals were pending, Petitioners became aware that the City had administered the 1986 PCT, including the enjoined event, to a group of applicants during the summer of 1988. Petitioners filed a contempt motion against the City and a hearing on the motion was held November 22, 1988.

While the 1987 appeals and the contempt action were pending, the City initiated settlement discussions with Petitioners, which culminated in the district court signing the consent decree of February 27, 1989. (Appendix-159.) The crux of the consent decree, the proportional hiring plan, required the City to "continue to appoint male and female applicants in proportion to the relative proportions of males and females achieving passing scores on the firefighter entry level test as a whole. . . ."[1] The parties dismissed their respective appeals as part of the settlement.

B. Evidence of History of Discrimination against Women

The 1989 consent decree resulted from a long history of discrimination against women, severe under-

---

[1] The district court had previously required "proportional hiring" on an interim basis. *Brunet I,* 642 F.Supp. at 1253.

representation as a result of this discrimination, and a hotly litigated case in which the City was found guilty of discrimination.

1. Written policy against allowing women to apply: Until 1975, a written policy existed against allowing women to apply to become firefighters. *Brunet,* 642 F.Supp. at 1223. The Court of Appeals said that "this designation ("male" job announcement) would clearly indicate that the City preferred, if not required, males over females for (the firefighter) position and would have the effect of discouraging women from applying for the job." *Brunet v. City of Columbus*, 1 F.3d 390, 408-09 (6th Cir. 1993) (Appendix-75) (hereinafter "*Brunet II*").

2. Thereafter, the City set out to alter its selection procedure to one which it knew would result in severe adverse impact to women applicants and had reason to believe was not job related: Historically, the City's entry level firefighter examination has consisted of two portions: a cognitive ability test (CAT) and a physical capability test (PCT). Prior to 1980, the PCT was scored on a pass/fail basis only and applicants were hired based upon the ranked order of their scores on the CAT. Thus, the PCT had no effect on an applicant's ranking on the eligibility list. *Brunet I,* 642 F.Supp. at 1234-1235.

The first two women firefighters in the history of the Columbus Division of Fire were hired in 1979. 1986 Stip. No. 7. Denise Elmore and Diane Russell were hired pursuant to a court order requiring one-for-one hiring of black and white applicants as a result of a 1975 finding that the City had been guilty of race discrimination. *Dozier v. Chupka,* 395 F.Supp. 836

(S.D.Ohio 1975), *inj. dissolved,* 763 F.Supp. 1430 (S.D.Ohio 1991).[2]

Following the hiring of the first women firefighters, the *Dozier* race-based hiring order, and a final order in *Brant v. City of Columbus,* Case No. C2-75-425 (S.D.Ohio 1979) (in which the district court held that the City's physical capability test for police applicants discriminated against women), the City decided that for all future hiring of firefighters, it would change the scoring of the firefighter test and begin to rank order candidates on the basis of the combined PCT and CAT. The district court found that "a major change in approach from a pass/fail examination occurred in 1980 without any apparent consideration being given to possible greater adverse impact on women." *Brunet I*, 642 F.Supp. at 1236.

This decision was made despite known problems with the validity of the PCT, despite the City's Testing Chief's admitted knowledge that the change would result in a significant adverse impact on women, and despite the warnings of the Fire Division's EEO Officer, Lem Ferguson, that it would have an adverse impact on women. At the 1986 trial, Mr. Ferguson, who had been with the Division since 1960, testified that in 1980, women were represented throughout the eligibility lists on the basis of the written exam, but

---

[2] In *Dozier*, the lower court ordered the City to hire one black for each white hired until the percentage of blacks on the force equalled the percentage of blacks in the labor market in Franklin County, and to maintain that percentage indefinitely. In 1991, the district court dissolved the hiring quota, finding that the City had substantially complied with the court's order after 16 years of compliance. *Id.*, 763 F.Supp. 1430.

when the PCT results were included in the ranked score, "the women ended in the cluster at the bottom of the list." Ferguson TR at 194, 197-198. Mr. Ferguson testified that he told the City testing personnel, including Chief of Testing S. David Kriska, that to avoid this adverse impact, the City should institute a job related cut score, and continue to grade the PCT on a pass/fail basis. *Id.*, at 198. Mr. Ferguson testified that the testing personnel ignored his suggestion and, after that, he was not invited to further meetings concerning changes in the testing procedure. *Id.*

3. Under the new selection procedure, implemented after the first women were hired and in use between 1980 and 1986, no women applicants were hired except pursuant to the Dozier race-based hiring order: It is undisputed that the only women hired between 1975 and 1986 were hired solely because of the *Dozier* hiring order. *Brunet I*, 642 F.Supp. at 1224; 1991 Stip. No. 5(c).

4. The selection procedure utilized by the City between 1980 and 1986 was unlawfully discriminatory against women: Between 1980 and 1986, the City tested two groups of applicants: one in 1980 and the other in 1984. All hirings between 1980 and 1986 came from these two groups. The only women hired from the 1980 eligibility list were hired solely because of the *Dozier* hiring order, and additional evidence showed a statistically significant difference in mean scores between male and female applicants on the 1980 list and that the PCT was the

source of this adverse impact.[3] The Court of Appeals found this evidence sufficient to establish that hiring from the 1980 list was discriminatory. *Brunet II*, 1 F.3d at 408 (Appendix-71).

In addition, the district court held that the hiring between 1984 and 1986 was discriminatory, since even with the *Dozier* order in force, the numbers of women who applied and were hired evidenced adverse impact, and the source of the adverse impact was the PCT. *Brunet I*, 642 F.Supp. at 1230. The court found that the 1984 PCT did not adequately reflect the requirements of the job, and was thus discriminatory under Title VII.

The district court also held that the City's use of rank order selection violated Title VII because the City could not establish that higher scores on the test meant better job performance. The injunction against the use of rank order selection existed until the 1989 consent decree was implemented.

5. The City's newly designed 1986 PCT was also found by the district court to violate Title VII, and the court rejected the City's proposed pass/fail score for the PCT: Again, the lower court found that the City's newly designed PCT discriminated against women. *Brunet I*, slip op. May 21, 1987. However, when one of the six events was eliminated, the district court found that the test was sufficiently job related to be used under Title VII.

---

[3] The PCT administered in 1980 and 1984 were virtually identical. *Brunet I*, 642 F.Supp. at 1236.

The district court was particularly critical of the City's proposed pass/fail score for the PCT. Manipulating the data in a "wholly unacceptable" manner, *Brunet I* , 642 F.Supp. at fn.14, the City argued that under its proposed cut score (which would have a severe adverse impact on women), 93% of incumbent firefighters would pass the PCT. Rejecting this manipulation, the district court found that using the City's proposed cut-score, nearly one-half of the City's incumbent firefighters would fail the test. The court adopted the Petitioner's proposed compensatory model, setting the cut-score at one standard deviation below the mean of scores of incumbent firefighters.

6. There continues to exist a manifest imbalance of women firefighters: Not surprisingly, following the above history of discriminatory treatment, women make up only a small fraction of the Fire Division workforce. This imbalance was stipulated by the parties as a factor in entering into the consent decree. 1991 Stip. Nos. 5(b), (c), (d).

Over the years for which data are available, women have made up between approximately 6% and 10% of the eligible applicants to the position of firefighter and 45% of the workforce in Franklin County, Ohio. Yet, the selection of women from the City's hiring practices in the absence of affirmative action has amounted to the "inexorable zero."

At the time of trial in February, 1986, eleven years after the City began to allow women to apply, only 5 of 822 firefighters were women, or less than one percent (.72%) of the force. *Id.* At the time the 1989 consent decree was signed by the court, only 15 of 1009, or 1.50% of the force was female. *Id.* In 1992, when the

district court struck down the consent decree, there were 23 women firefighters of a total force of 1112, representing only 2% of the force. *Id.*, at Stip. No. 7.

C. *Brunet II:* Tucker Challenge to the Consent Decree

The City hired firefighters pursuant to the consent decree without interruption nor objection until two and one-half years later when a group of male applicants filed suit to enjoin hiring pursuant to the consent decree under the Equal Protection Clause. *Tucker, et al v. James, et al.,* Case No. C2-91-616. On August 13, 1991, the district court granted the motion of the male applicants to intervene in the *Brunet* case. For purposes of clarity, the male Intervenors, Respondents herein, shall be referred to as the Intervenors.

Following hearing, the district court held that by entering into the consent decree in 1989, the City had intentionally discriminated against male applicants, and enjoined hiring under the terms of the consent decree. *Brunet II,* slip op., March 18, 1992 (Appendix-127).

Although the essence of the Intervenors' suit was that the City should be required to hire on the basis of strict rank order selection and most of the evidence presented by Intervenors at hearing went to that issue, the district court declined to find that strict rank order selection was valid. Instead, it required an additional hearing on the issue, in the event the City expressed a desire to revert to strict rank order selection. *Id.* Not surprisingly, the City did so indicate to the lower court, and an additional hearing was ordered by the court on two factual issues relating to strict rank order selection. Thereafter, the court approved the use of strict rank

order selection. *Brunet II,* slip op. July 24, 1992 (Appendix-102), and final judgment was entered on September 24, 1992. The Petitioners filed timely appeals from each of the above orders, and, in a consolidated appeal, the Sixth Circuit Court of Appeals affirmed the district court's finding that the consent decree violated the Fourteenth Amendment, and reversed and remanded the finding that strict rank order selection was valid. *Brunet II,* 1 F.3d 390 (6th Cir. 1993) (Appendix-5). Petitioners seek review of the judgment affirming the holding that the consent decree violates the Equal Protection Clause.

Specifically, the Court of Appeals held that the male applicants had standing to challenge the consent decree, even though their dates of hire were unaffected by operation of the consent decree. *Brunet II,* 1 F.3d at 401 (Appendix-43-44). In an inappropriate expansion of this Court's holding in *Northeastern Florida Contractors v. Jacksonville,* __ U.S. __, 113 S.Ct. 2297 (1993), the appellate court held that the mere fact that the male applicants were required to work with female applicants hired as a result of the consent decree amounted to a "diminution in employment status," sufficient to confer on them standing under Article III of the United States Constitution.

Secondly, in addressing the question of whether or not there was sufficient evidence of prior discrimination to justify the consent decree, the Court of Appeals departed from this Court's holding in *Croson* and the holdings of other appellate courts that followed *Croson.* The Court of Appeals disregarded evidence of a policy that excluded women as firefighters, tests that discriminated against women, and a manifest statistical

imbalance in the number of women firefighters. In so doing, the appellate court isolated and rejected the numerous evidentiary bases on which the 1989 consent decree was based.

Finally, the Sixth Circuit Court of Appeals applied a strict scrutiny standard in this gender based affirmative action case, while this Court and the Second, Fourth, Ninth, and District of Columbia Circuit Court of Appeals have required that gender based challenges be subject to the intermediate standard of review. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, 106 S.Ct. 1490 (1982). Following the Court of Appeal's decision of July 28, 1993, Petitioners herein sought a rehearing and rehearing *en banc*, both of which were denied on October 4, 1993.

ARGUMENT

I. THE USE OF THE STRICT SCRUTINY STANDARD IN THIS CASE IS ERROR, IN LIGHT OF THE ADOPTION BY THIS COURT AND THE SECOND, FOURTH, NINTH AND DISTRICT OF COLUMBIA CIRCUIT COURTS OF APPEAL OF THE INTERMEDIATE STANDARD FOR GENDER BIAS CASES.

The Court of Appeals applied the strict scrutiny analysis in this gender discrimination affirmative action case under the Fourteenth Amendment. Brunet II, 1 F.3d at 404 (Appendix-53). The court relied upon its previous decision in *Conlin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989) (applying strict scrutiny to race and gender preference hiring), noting the conflict with the decision of the Ninth Circuit Court of Appeals in *Coral Constr. Co. v. King County*, 941 F.2d 910, 931 (9th Cir. 1991), *cert. denied*, __U.S. __, 112 S.Ct. 875 (1992) (applying intermediate standard in a case involving gender-based affirmative action).

This Court should grant *certiorari* to resolve the conflict between the Sixth and Ninth Circuit Courts of Appeals. The Could should then reverse the Court of Appeals' holding that strict scrutiny is appropriate in gender discrimination affirmative action cases, in light of this Court's holding in *Mississippi University for Women, supra,* that an intermediate standard should be applied in cases of gender bias under the Fourteenth Amendment:

> Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must

> carry the burden of showing an 'exceedingly persuasive justification~' for the classification .... The burden is met only by showing at least that the classification serves "important governmental objectives and the discriminatory means employed' are 'substantially related to the achievement of those objectives....'

Id., 458 U.S. at 724, 102 S.Ct. at 3336 [citations omitted]; *see also*, *Stanton v. Stanton*, 421 U.S. 7,13, 95 S.Ct. 1373, 1377 (1975).[4]

In *Coral Constr. Co. v. King County, supra*, the Ninth Circuit Court of Appeals stated:

> Under intermediate scrutiny, a gender-based classification must serve an important governmental object, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective.

Id., 941 F.2d at 931; *see also, Manufacturers Hanover Trust Co. v. United States*, 775 F.2d 459, 464 (2d Cir.); *cert. denied*, 475 U.S. 1095, 106 S.Ct. 1490 (1986); *United States v. Commonwealth of Virginia*, 976 F.2d 890, 895 (4th Cir.), *cert. denied, sub nom, Virginia Military Institute v. United States*, __ U.S. __, 113 S.Ct. 2431 (1993); *Wauchope v. U.S. Dept. of*

---

[4] Justice Ginsburg, however, recently noted that it is an open question whether the strict scrutiny standard applies to classifications based on gender under the Fourteenth Amendment. *Harris v. Forklift Systems, Inc.*, __ U.S. __, 114 S.Ct. 367, 373, fn. (1993) (Ginsburg, J., concurring).

State, 985 F.2d 1407, 1412 (9th Cir. 1993); *United States v. DeGross*, 960 F.2d 1433, 1439 (9th Cir. 1992) and *Lamprecht v. F.C.C.*, 958 F.2d 382 (D.C. Cir. 1992).[5]

There is no reason to treat a plaintiff who was discriminated against by affirmative action any differently than a plaintiff who received any other form or gender based discriminatory treatment.

II. THE COURT OF APPEALS CONTRAVENED THE HOLDINGS OF THIS COURT AND OTHER FEDERAL APPELLATE COURTS BY HOLDING THAT THE TOTAL EXCLUSION OF WOMEN FIREFIGHTERS UNTIL 1975, THE USE OF DISCRIMINATORY TESTING PROCEDURES BETWEEN 1980 AND 1986, AND THE GROSS DISPARITY BETWEEN THE FEMALE APPLICANT POOL AND WOMEN ON THE JOB DID NOT SUPPORT A GENDER CONSCIOUS CONSENT DECREE.

This Court, in its last pronouncement on what is the standard for upholding gender affirmative action plans, held that there must be "a 'strong basis in evidence for [the] conclusion that remedial action was

---

[5] This Court granted *certiorari* in a case to decide whether the state may use peremptory challenges to strike members of a jury on account of their sex. *J.E.B. v. T.B.*, *cert. granted,* Case No. 92-1239, __ U.S. __, 113 S.Ct. 2330 (1993). This Court may establish the standard for proving sex-based discrimination cases under the Fourteenth Amendment in this case. See Petitioner's Brief in *J.E.B. v. T.B., supra.*

necessary.'" *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500, 109 S.Ct. 706, 725 (1989), quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277, 106 S.Ct. 1842, 1849 (1986) (plurality opinion). This Court also stated that affirmative action may be justified by a *prima facie* case of discrimination. *Croson*, *supra*, 488 U.S. at 500, 109 S.Ct. at 725. A manifest imbalance in the work force is one way to show a *prima facie* case of discrimination.

The Court of Appeals in the case at bar applied a standard for determining the validity of affirmative action plans which runs contrary to *Croson*, *supra* and other decisions of this Court and virtually all other circuit courts of appeals that have decided the issue. In addition, recent decisions by federal courts reveal some uncertainty as to what type of evidence is sufficient to uphold affirmative action for women and blacks.[6] This Court should grant *certiorari* to resolve the disagreements among the courts of appeals and to settle the issue of what evidence is sufficient to support affirmative action. This Court should grant *certiorari* to answer the questions that have surfaced since the Court's decision in *Croson*, *supra*.

---

[6] See, *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir.)*(en banc)*, *cert. denied*, __ U.S. __, 114 S.Ct. 290 (1993) in which the Seventh Circuit Court of Appeals split 5 to 4 on the standard to be used in affirmative action cases. Also, compare the decision of the Court of Appeals in the case at bar with the decision of the trial court. The trial court appeared to require proof of prior judicial findings of intentional discrimination. The Sixth Circuit Court of Appeals disagreed with this finding but affirmed the decision on other grounds that are inconsistent with precedents established by this Court and other federal appellate courts.

A. The Court of Appeals erred in holding that the City's pre-1975 all-male policy was too remote.

The Sixth Circuit Court of Appeals held that a policy prior to 1975 that did not permit women to become firefighters was too remote to support a 1989 consent decree that provided gender-conscious relief. In so doing, the Court of Appeals ignored the fact that the City of Columbus had instituted selection procedures that discriminated against women until 1986.[7] Holding that a past policy of total exclusion of women (or blacks) is too remote to support affirmative action is contrary to precedent established by this Court and other federal appellate courts. See, *United States v. Paradise*, 480 U.S. 149, 167, 107 S.Ct. 1053, 1064 (1987) (defendants had by 1972 excluded blacks from jobs for decades); *Stuart v. Roache*, 951 F.2d 44, 452 (1st Cir.), *cert. denied,* __ U.S. __, 112 S.Ct. 1948 (1992) (in 1970, 2% of the Boston Police Officers were black); *Howard v. McLucas*, 871 F.2d 1000,1007 (11th Cir.), *cert. denied, sub nom, Poss v. Howard,* 493 U.S. 1002, 110 S.Ct. 560 (1989) (blacks held only 3.3% of

---

[7] The first women firefighters were hired in 1979. After women were permitted to become firefighters, the City changed its testing procedures to require candidates to be ranked on both the written and physical capability test, whereas when women were excluded, candidates merely had to pass the physical test and were ranked on the written test. The City knew that the 1980 test would have an adverse impact on women and made no attempt to reduce the adverse impact. The 1980 and 1984 firefighter test discriminated against women, as the lower courts have held. Although the City was able to validate its 1986 test through content validity, ranking had not been validated and had been found to be discriminatory. Therefore, in February, 1989, when the consent decree was filed, ranking on the firefighter test discriminated against women.

the supervisory positions in 1973); *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1442 (9th Cir. 1989).

The holding of the Sixth Circuit Court of Appeals could set a dangerous precedent. This and federal appellate courts have upheld affirmative action consent decrees that were designed primarily to eliminate policies of the early to late 1970's that prevented blacks and women from becoming firefighters and police officers. Past exclusionary policies were primarily responsible for the severe underrepresentation of women and blacks in the country's safety forces in the 1980's and 1990's.

The ruling of the Sixth Circuit Court of Appeals, if allowed to stand, could have the effect of eliminating many race and gender conscious consent decrees throughout the country. The ruling might make it virtually impossible for cities to institute any program to eliminate the disparities that resulted from its past discriminatory practices and policies and might ensure that the safety forces would remain predominantly white male.

The Court of Appeals in the case at bar cited a D.C. Circuit Court of Appeals decision [*Hammon v. Barry*, 826 F.2d 73, 76-77 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1036 (1988)] in support of its holding that the pre-1975 exclusion of women from the Division of Fire was too remote. *Hammon* is inapposite to the instant case. In *Hammon*, after the discriminatory policy was ended 18 years before the affirmative action, the City, unlike the City of Columbus in the case at bar, did not engage in any discrimination against blacks and hired large percentages of black

officers. (50% between 1969 and 1981 and 75% thereafter.)[8]

On the other hand, in the case at bar, after the all-male policy ended, the City of Columbus instituted other discriminatory practices that prevented women from becoming firefighters. The male-only policy of the City must be considered as part of the City's discriminatory hiring practices that continued up until at least 1986. The 1980 and 1984 firefighter tests were held to discriminate against women. And although the 1986 firefighter test was held to be content valid, ranking on the 1986 test discriminated against women, because it had an adverse impact and had not been shown to be job related.

The City's policy that prevented women from becoming firefighters is certainly not too remote in time: the explicit policy ended only nine years before the *Brunet* suit was filed, and the exclusion of women extended until 1979, five years before this suit was filed. Furthermore, the consent decree was entered three years after the district court ordered the City to stop discriminating against women applicants.

---

[8] See also, *Billish v. City of Chicago*, *supra*, in which the Seventh Circuit Court of Appeals pointed out that the City of Chicago discriminated against black applicants to the Police Department in 1972, but that the discriminatory practices were eliminated by a 1974 consent decree. *Id.*, 989 F.2d at 893. The majority of the Court, which took a restrictive view of affirmative action (see dissent, 989 F.2d at 897), still apparently believed that evidence of discrimination between 1972 and 1974 was probative on the issue of whether 1987 affirmative action was constitutional. *Id.*, 989 F.2d at 893.

B. Contrary to the holding of the Court of Appeals, the discriminatory 1980 and 1984 firefighter tests support the gender-conscious consent decree.

The Court of Appeals held that the fact that the 1980 and 1984 firefighter tests discriminated against women did not support the consent decree, because the discrimination was remedied. The Court of Appeals noted that women were hired from the 1980 and 1984 firefighter tests in proportion to their percentage on the hiring lists.[9] If the 1980 and 1984 tests were the City's only discriminatory acts, the Court of Appeals might very well have been correct. However, the two firefighter tests are only part of the evidence that supports the consent decree and must be considered along with the past policy that prohibited women from becoming firefighters.

The Court of Appeals erred in not considering the 1980 and 1984 discriminatory tests in the context of a past policy that excluded women from the Fire Department. This Court and other appellate courts have never held that selection procedures, in the context of other practices that have prevented blacks or women from being hired, are irrelevant in determining whether consent decrees are constitutional. In fact, federal courts have considered

---

[9] Because of a previous order that required the City of Columbus to hire one black for every white firefighter hired, the City hired four women from the 1980 list, which is what one would expect considering their numbers on the list. The federal judge in the case at bar ordered the City to hire women in proportion to the number of women that had passed the 1984 test after ruling that this test discriminated against women.

evidence of discriminatory tests probative of the issue of whether race or gender-conscious consent decrees are constitutional. See, *Stuart v. Roache*, *supra*, 951 F.2d at 452.

C. The Court of Appeals erred in rejecting the statistics of a severe imbalance of men and women in the Columbus Division of Fire.

The Court of Appeals rejected evidence that women were severely underrepresented in the Columbus Division of Fire. As of the date of the trial court's decision finding that women had been discriminated against (1986), 6 of 822 or .72% of the City's firefighters were women. It was undisputed that all six of these women had been hired solely because of the race preferential hiring order in *Dozier v. Chupka*. There were undoubtedly so few women firefighters because of the pre-1975 all-male policy that excluded women and the discriminatory tests thereafter. The Court of Appeals, however, asserted that "this statistical information is not particularly helpful in showing discrimination or rebutting discrimination because there is no evidence of how many women desired the position, were qualified and yet were not hired." *Brunet II*, 1 F.3d at 407 (Appendix-70).

Contrary to what the Court of Appeals stated, the Petitioners presented the statistics of women who wanted, and were qualified, to become firefighters. The best evidence of the relevant labor market comes from the 1984 statistics, when the city EEO officer

made her best attempts to recruit women firefighters.[10] The uncontradicted evidence was that in 1984 11% of the firefighter applicants were women. It is impossible to present any accurate statistics on what percentage of the women (or men) were qualified to be firefighters *based on the results of the firefighter test,* because the test was held to be discriminatory. However, if one considers that those who pass the test are qualified, 6% of the candidates who passed were women, an obvious gross disparity from the .72% of the women who were then firefighters. Based on the 1980 statistics, 5.3% of the applicants were women and 3.3% of those who passed were women. In 1978, before the City started recruiting women, 4.5% of the applicants were women. If the number of applicants for every year from 1978 to 1990 is averaged, women constituted 9% of the applicants and 5% of those who passed the tests.[11]

Petitioners presented more evidence on the relevant labor market than has been required by other federal courts. A number of federal appellate courts have held that there are no special qualifications for police officers and firefighters. They have therefore held that one can determine whether there are imbalances by comparing the proportion of minorities and women in the police and fire departments with

---

[10] The EEO Officer testified, in testimony cited by the Court of Appeals to show that the City had made the greatest strides to eliminate discrimination in 1984, when the percentage of women who applied increased by 6% over the percentage in 1980. See Tr. II, at 813.

[11] These statistics are contained in the Jt. App. III, 524, 525, 527, 531, 528, 580, and 1155.

their proportions in the population of the City. See, *Davis v. City and County of San Francisco, supra*, 890 F.2d at 1446-1447; *Donaghy v. City of Omaha*, 933 F.2d 1448, 1460 (8th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 938 (1992); *Stuart v. Roache*, *supra*, 951 F.2d at 452; and *Peightal v. Metropolitan Dade County*, 940 F.2d 1394, 1404-1405 (11th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 969 (1992). In the cases cited above, statistical imbalance constituted the primary basis for the affirmative action. If one assumes that women do not apply at the same rate as men and that there are special qualifications for the job of firefighter, the percentage of women who applied and passed the tests are the closest that one can get to determine the "appropriate" statistics. The appellate court's rejection of the only available evidence on the percentage of qualified women in the labor market (the percentage of women who had applied for the job and who had passed the test) makes it virtually impossible to show statistical imbalance in the work force.

D. The Court of Appeals erred in rejecting statistics of significant disparity in test results since 1988.

The Court of Appeals stated that women constituted two percent of those who passed the 1988 firefighter test and that if there had been no court-ordered proportional hiring requirement, no woman would have been hired from the list. In addition, the court noted that 6% of those who passed the 1990 test were women, whereas, only one woman would have been hired "had it not been for the consent decree". *Brunet II*, 1 F.3d at 407 (Appendix-68). The Court of Appeals correctly concluded that "[t]hese statistics do indicate a significant disparity." *Id.*

The Court, however, held that the male Intervenors rebutted these statistics by showing that the reason that women would not have been selected is that, in the absence of proportional hiring, women would have ranked below men on a test that was proved to be job related. The Court stated that the City has known since 1987 that ranking on the firefighter test is job related.

The Sixth Circuit Court of Appeals, without support from any authority, decided that evidence and a judicial finding *after* the consent decree was struck down may be used to support the striking down of the consent decree. Such a holding is contrary to settled law and must not be allowed to stand.

In February, 1989, when the consent decree was signed, ranking on the firefighter test was enjoined as discriminatory against women. At the time the district court enjoined ranking, it gave the City a choice: it could either use a job related pass fail score to determine who were qualified applicants, or it could attempt to validate ranking by way of predictive and concurrent validity studies. In 1987, the City's expert completed a concurrent validity study and the City filed it. No discovery of the study had been completed nor had a hearing on the study been scheduled. The evidence was that the City did not know whether the Court would find that ranking was job related based upon that study.[12] In fact, the City believed that the concurrent validity study would not be sufficient to validate ranking, because the district court had also

---

[12] The district court had previously rejected two studies by this same expert witness and his firm.

required a predictive validity study. Therefore, as of the date of the consent decree, ranking on the firefighter test was discriminatory.

The validity of ranking is irrelevant to whether or not the consent decree is constitutional. If, as in this case, the consent decree is supported by at least a prima facie showing of discrimination, that evidence is not rebuttable by an after-the-fact finding that ranking is valid. To hold otherwise would require parties to affirmative action consent decrees to predict with exacting precision what evidence on validity others may in the future be able to muster. It would also require parties to secure judicial determinations on all factual issues prior to entering into consent decrees. In short, such a holding means that no cities that have engaged in severe discrimination will enter into consent decrees to eliminate discrimination.

III. THE SINGULAR FACT THAT THE MALE INTERVENORS WERE HIRED AT THE SAME TIME AS WERE THE FEMALE PETITIONERS IS NOT SUFFICIENT INJURY UNDER ARTICLE III TO CONFER STANDING ON THEM INDIVIDUALLY AND TO ALLOW THEM TO REPRESENT THE UNNAMED MEMBERS OF THE CLASS.

A. The Court of Appeals' finding of a loss of 'competitive status' is not supported by the record.

This Court of Appeals found that a purported "diminution in employment status," without more, is sufficient injury to confer standing on three of the four

named Intervenors to attack a consent decree's proportional hiring plan.[13]

The Court of Appeals agreed with Petitioners that the three Intervenors (Tudor, Meyer, and Hilleary) were hired when they would have been hired in the absence of a consent decree, and thus did not have standing to challenge the consent decree on the basis of denial of a job or job opportunity. The three Intervenors received exactly the same seniority that they would have received if there had been no consent decree.[14] Nevertheless, the Court of Appeals found that the Intervenors suffered a loss of "competitive status" in employment, because they were hired at the same time as two Petitioners, Denise Sachs and Vickie Fox, and thus would have to compete on the job with these two individuals. *Brunet II*, 1 F.3d at 401 (Appendix-41-42).[15]

---

[13] The Court of Appeals correctly held that the fourth intervenor, Guy Tucker, did not have standing. There was no evidence that he would have been selected in the absence of a consent decree, and injury to him was "merely speculative". *Brunet II*, 1 F.3d at 399 (Appendix -33).

[14] Jt. Stipulation No. 10 stated that all firefighters hired the same date received exactly the same seniority, for all purposes, including benefits and competition for positions.

[15] None of the parties, nor the trial court, made the argument that the intervenors suffered a diminution in competitive status. A good part of the oral argument focused on whether the injury was speculative or whether any of the intervenors would have been hired in the absence of the consent decree.

Before Intervenors filed suit, the City offered to hire two males, Meyer and Tudor, along with the rest of the scheduled class (which included Vickie Fox and Denise Sachs). The Intervenors did not agree, and they pursued their action. The district court granted the Intervenors' motion for a temporary restraining order, without a hearing, which prevented hiring under the consent decree. According to the temporary restraining order, Intervenors Tudor and Meyer would be hired but the two Petitioners, Sachs and Fox, would not be.

Petitioners sought an emergency stay from the Court of Appeals. The Court of Appeals, Martin, J., granted the stay and ordered an expansion of the class from 36 to 38 members, that would include Intervenors Tudor and Meyer, as well as Petitioners Sachs and Fox. The following day, the district court in effect stayed the Court of Appeals' stay, and Petitioners again received an emergency stay from the appellate court consistent with its earlier one. Intervenors Tudor and Meyer began the training academy along side Petitioners Fox and Sachs.

The asserted loss of competitive status resulted from the fact that if there had been no consent decree (and no emergency stay from the Court of Appeals), there would have been two fewer firefighters (1,110, instead of 1,112). The Court reasoned that because of the consent decree, the Intervenors would have to compete on the job against two more persons than they would have had to compete against if there had been no consent decree.

B. The injury determined by the Court of Appeals has not been recognized by other federal courts nor this Court.

The cases cited by the Court of Appeals do not support standing based on the court's interpretation of "competitive status".

The court's use of "competitive status" comes from language in this Court's opinion in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766, 96 S.Ct. 1251, 1265 (1976). This Court held in *Franks*, *supra*, that competitive status seniority would determine employees' transfers, layoff, shift assignments, etc. This Court in *Franks*, *supra*, stated that employees who had less seniority would not be able to compete as well as those with greater seniority. Therefore, this Court held that victims of discrimination should receive the same seniority as they would have received in the absence of discrimination; i.e., the same seniority as those who received the jobs which the victims were denied.

This Court never suggested that victims of discrimination would suffer a loss of "competitive status seniority" if they received the same seniority as those who received the jobs which they were denied. Petitioners have found no case in which any court has held that a plaintiff has suffered injury because he/she received the same seniority (competitive status or benefits) as did persons who, because of the purported discrimination, also obtained the job.

The affirmative action standing cases cited by the Court of Appeals do not support the extreme position adopted by that court. This Court in *Regents of the*

University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733 (1978) found that a white student had standing to challenge affirmative action in a medical school because he was denied consideration for a position in the school, not because he was hired along with affirmative action applicants.

This Court recently held that white contractors had standing to attack minority set asides because they alleged a denial of consideration for contracts. *Northeastern Florida Contractors v. Jacksonville, supra.*[16]

These two cases have no application where, as here, none of the alleged victims of discrimination was denied consideration for a position. In fact, in the case at bar, the three alleged victims (the Intervenors) were hired on the same date they would have been hired even if there had been no consent decree.

Other appellate courts have required real injury in order for the plaintiffs to have standing to attack affirmative action decrees, certainly far more than the nebulous "diminution of competitive status" permitted in the case at bar. In *Donaghy v. City of Omaha, supra*, 933 F.2d at 1455, the Eighth Circuit Court of Appeals held that the person who attacked an affirmative action consent decree had standing to

---

[16] "When the government enacts a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." Id., 113 S.Ct. at 2303.

challenge only the fact that he was not *considered for a particular opening*.

The case at bar points out the need for a rigorous examination of whether named plaintiffs have standing to represent a class. The Intervenors' case was propelled by attorneys who wanted to overturn the consent decree and who paid virtually all the costs of the lawsuit. The attorneys represented clients who testified that they had nothing to gain from the litigation, and that their purpose in pursuing the litigation was to bring an end to the "quota". *Meyer Dep. Transcript*, 65; *Tudor Dep. Transcript*, 44; *Hilleary Dep. Transcript*, 6, 24, 26-28; and *Tucker Dep. Transcript*, 41-42, 49 (R-351). Standing for purposes of Article III of the Constitution requires more than a generalized dislike for affirmative action.

IV. CONCLUSION

For the foregoing reasons, Petitioners respectfully urge this Court to grant their Petition for Writ of Certiorari and hear these important issues on the merits.

Respectfully submitted,

Alexander M. Spater
Counsel of Record

Kathaleen B. Schulte

SPATER, GITTES, SCHULTE & KOLMAN
723 Oak Street
Columbus, Ohio 43205
(614) 221-1160

Attorneys for Petitioners

(2)

Supreme Court, U.S.
FILED
SUBMITTED JAN 3 1994
OFFICE OF THE CLERK

CASE NO.

THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

Ann Brunet and Denise Sachs, on behalf of themselves and the class they represent,
Petitioners,

and

Guy E. Tucker, James T. Meyer, Stuart J. Tudor, and Joseph S. Hilleary, on behalf of themselves and the class they represent,
Respondents,

v.

City of Columbus, Ohio, Columbus Civil Service Commission, Dana Rinehart, Alphonse Montgomery,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPENDIX
PETITION FOR WRIT OF CERTIORARI

Alexander M. Spater
Counsel of Record
Kathaleen B. Schulte
SPATER, GITTES, SCHULTE & KOLMAN
723 Oak Street
Columbus, Ohio 43205
614/221-1160
Attorneys for Petitioners

165 pp

Brunet, *et al.*, *Petitioners* v. City of Columbus, *et al.*, *Respondents*

INDEX TO THE APPENDIX

Order of the Sixth Circuit Court of Appeals Denying Petition for Rehearing *en banc* and Petition for Rehearing, dated October 4, 1993 1

Judgment of the Sixth Circuit Court of Appeals Affirming in Part and Reversing and Remanding in Part, dated July 28, 1993 3

Decision of the Sixth Circuit Court of Appeals Affirming in Part and Reversing and Remanding in Part, dated July 28, 1993 5

Memorandum Opinion, Findings of Fact and Conclusions of Law of the United States District Court, dated July 24, 1992 . 102

Memorandum Opinion, Findings of Fact and Conclusions of Law of the United States District Court, dated March 18, 1992 127

Order of the United States District Court, dated February 27, 1989 159

FILED OCTOBER 4, 1993

Nos. 92-3340/3893/4102

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANN BRUNET; DENISE SACHS, ON BEHALF OF THEMSELVES AND THE CLASS THEY REPRESENT,	)	
Plaintiffs-Appellants,	)	
GUY E. TUCKER, ET AL.,	)	
Intervenors-Appellees,	)	
V.	)	**ORDER**
CITY OF COLUMBUS, ET AL.,	)	
Defendants-Appellees.	)	

BEFORE: KENNEDY and MILBURN, Circuit Judges; and WELLFORD, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active

judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

FILED JULY 28, 1993

UNITED STATES COURT OF APPEALS
FOR THE SIX CIRCUIT

NOS: 92-3340: 92-3893: 92-4102

ANN BRUNET and DENISE SACHS, on behalf of themselves and the class they represent,

Plaintiffs - Appellants,

GUY E. TUCKER, JAMES T. MEYER, STUART J. TUDOR, and JOSEPH S. HILLEARY, on behalf of themselves and the class they represent,

Plaintiffs/Intervenors - Appellees,

v.

CITY OF COLUMBUS; OHIO COLUMBUS, CIVIL SERVICE COMMISSION; DANA RINEHART; ALPHONSE MONTGOMERY,

Defendants - Appellees.

Before: **Kennedy** and **Milburn**, Circuit Judges; and **Wellford,** Senior Circuit Judge

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio at Columbus.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ORDERED that the order of the district court setting aside the consent decree, and the order of the district court adjusting the seniority of firefighters Fox and Sachs are affirmed. IT IS FURTHER ORDERED that the order of the district Court validating rank-order hiring is reversed and the case is remanded for further proceedings consistent with the opinion.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Issued as Mandate: October 12, 1993

COSTS: None

Filing Fee. . . . . .$
Printing . . . . . .$
Total . . . . . .$

Nos. 92-3340/3893/4102

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANN BRUNET and DENISE SACHS, on behalf of themselves and the class they represent,
Plaintiffs-Appellants,

GUY E. TUCKER; JAMES T. MEYER; STUART J. TUDOR; and JOSEPH S. HILLEARY, on behalf of themselves and the class they represent,
Plaintiffs-Intervenors-Appellees,

v.

CITY OF COLUMBUS; OHIO COLUMBUS CIVIL SERVICE COMMISSION; DANA RINEHART; ALPHONSO MONTGOMERY,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio

---

Decided and Filed July 28, 1993

Before: KENNEDY and MILBURN, Circuit Judges; and WELLFORD, Senior Circuit Judge.

KENNEDY, Circuit Judge, delivered the opinion of the court, in which MILBURN, Circuit Judge, joined.

WELLFORD, Senior Circuit Judge (pp. 47-48), delivered a separate concurring opinion.

KENNEDY, Circuit Judge. Plaintiffs-appellants Ann Brunet and Denise Sachs, female firefighters of the Columbus Division of Fire (the "CDF"), and the class they represent (the "Brunet plaintiffs"), appeal three separate orders of the District Court involving the CDF's hiring of entry level firefighters. First, they appeal the District Court's order of March 18, 1992, setting aside a February 27, 1989 consent decree between the Brunet plaintiffs and defendant-appellee City of Columbus (the "City") and enjoining the City from selecting firefighters in the manner provided by the consent decree. Second, they appeal the District Court's order of July 24, 1992, holding that strict rank-order hiring on the basis of an applicant's total score on the firefighter examination is valid and may be used to select firefighters. Third, the Brunet plaintiffs appeal the District Court's final

judgment entered September 24, 1992, which incorporates its order of September 23, 1992, reducing the seniority of two female firefighters. These appeals result from a class action by Stuart Tudor, James Meyer, Joseph Hilleary and Guy Tucker (the "Tucker plaintiffs"), male CDF firefighters or candidates, against the City[1] alleging that the City's hiring of firefighters in accordance with the consent decree of February 27, 1989, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by discriminating against male applicants in the selection of entry level firefighters. The District Court consolidated the two class actions.

On appeal, the issues are (1) whether the District

---

[1] The Tucker plaintiffs also named as defendants their action: Larry H. James, Director of Public Safety; Harmon J. Dutko, Chief of the Division of fire; the Civil Service Commission of Columbus; Civil Service Commissioners Daniel D. Connor, Julia F. Johnson, and Frederick L. Ransier.

Court engaged in determining that the Tucker plaintiffs had standing to pursue their action; (2) whether the District Court erred in holding in May, 1986 that the Brunet plaintiffs failed to prove intentional discrimination in their claim brought under 42 U.S.C. § 1983; (3) whether the District Court erred in holding that the method of hiring entry level firefighters provided for by the consent decree violated the Tucker plaintiffs' Equal Protection guarantees not to be discriminated against on the basis of their gender; (4) whether the District Court erred in finding that the City discriminated against the Tucker plaintiffs by agreeing to the February 27, 1989 consent decree on the grounds that no such allegations were made by the Tucker plaintiffs in their complaint and that that claim is outside the applicable statute of limitations; (5) whether the District Court erred in determining that strict rank-order hiring on the basis of a candidate's total score on the 1986 *et seq.* firefighter

examination is a valid, job-related method of choosing qualified candidates for the position of firefighter; (6) whether the District Court erred in determining that the Brunet plaintiffs had failed to show the existence of an alternative selection device that has a less adverse impact on women; and (7) whether the District Court erred in holding that an appropriate remedy for the Tucker class of plaintiffs was to alter the seniority dates of two female firefighters. For the reasons stated below, we affirm in part, reverse in part and remand for further proceedings.

I.

A.

Brunet Litigation

The background of this case is lengthy. Plaintiffs Ann Brunet and Denise Sachs are currently CDF firefighters. In 1980 and 1984, Brunet took the City's firefighter examination and was not selected as a firefighter. In

1984, Brunet, together with three other plaintiffs, brought a class action against the City[2] alleging that the City's entry level firefighter examination discriminated against women. The District Court in that case certified a class of all past, present, and future female firefighter candidates.

The 1980 and 1984 firefighter examination consisted of a physical capability test ("PCT") and a written examination called a cognitive ability test ("CAT"), which included a mechanical reasoning test. The CAT constituted 70 percent of the applicant's total score. The PCT constituted 30 percent of the applicant's total score. Each candidate was ranked on the basis of his or her total score on the examination. Candidates who had taken the 1975 and 1978 examinations were ranked

---

[2] The other defendants were the Columbus Civil Service Commission, Columbus Mayor Dana Rinehart, and Columbus Safety Director Alphonse Montgomery.

on the basis of their scores on the CAT alone. The PCT was administered on a pass/fail basis. The District Court in Brunet determined that this change in the ranking procedure occurred as a result of a Civil Service Commission study conducted by the City that found that "the work of firefighting was largely physical, and that better firefighters were distinguished by the ability to excel while performing physical tasks." *Brunet v. City of Columbus,* 642 F. Supp. 1214, 1236 (S.D. Ohio 1986), *appeal dismissed,* 826 F.2d 1062 (6th Cir. 1987), *cert. denied,* 485 U.S. 1034 (1988). Pursuant to a court order in *Dozier v. Chupka,* 395 F. Supp. 836 (S.D. Ohio 1975), applicants who took the 1980 and 1984 examination were ranked in the order of their total score on separate eligibility lists for white and black applicants. The purpose of these separate lists was to increase the percentage of black firefighters in the CDF.

In their complaint, the Brunet plaintiffs challenged the

1980 and 1984 PCT and the mechanical reasoning portion of the CAT as having a disparate impact on female candidates and as not being job related in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Plaintiffs further contended in a 42 U.S.C. § 1983 claim, that the City in 1980 and 1994 acted with intentional discrimination against female firefighter candidates in violation of the Equal Protection Clause of the Fourteenth Amendment.

The District Court's decision in *Brunet* consisted of an opinion and order entered on May 13, 1986, and a supplemental opinion and order entered on May 30, 1986. The District Court held that the 1980 PCT and the 1980 and 1984 mechanical reasoning tests did not violate Title VII because they had not had a disparate impact on the class of female candidates. *Brunet,* 642 F. Supp. at 1221. The District Court also held that the plaintiffs failed to prove intentional discrimination in

connection with their Equal Protection claim brought under section 1983. *Id.* at 1223. However, the District Court held that the 1984 PCT did violate Title VII because the 1984 PCT had a disparate impact on female candidates, and the City had failed to demonstrate that the PCT, as it was then designed, was job related. *Id.* at 1247-50. The District Court also held that the City's practice of rank-order hiring from a single list grouping together males and females was impermissible under Title VII because the City could not establish that higher scores on the test meant better job performance. *Id.* at 1248-49.

The *Brunet* Court enjoined the City from hiring any new firefighters until a new PCT could be validated for the 1986 examination. *Id.* at 1253. It also enjoined the use of rank-order selection from a single list comprised of female and male candidates until strict rank-order hiring could also be validated. *Id.* at 1252-53. Until

validation, the City was required to establish a pass/fail scoring system for the PCT based upon the scores of incumbent firefighters and to hire men and women in proportion to the number of each sex passing the 1986 examination. *Id.* at 1253. Finally, the District Court held that upon adoption of a content valid examination, the City was required to offer the new test to the 1984 female applicants and hire the number of women who would have been hired in 1984 had the test been content valid. *Id.*

However, on July 14, 1986, before the 1986 test was content validated, the District Court entered an order, also reported at 642 F. Supp. 1214, in which it modified its injunction to allow the City to hire men and women firefighters in proportion to the number of males and females who passed the 1986 test and to select from within either category, either by rank order or on a random basis. *Id.* at 1254-58. This action was

necessary to satisfy the City's urgent need for new firefighter recruits. Plaintiffs appealed and the City cross-appealed.

While the appeals were pending, the City developed a new 1986 PCT and submitted a content-validity study. Stated simply, a content-valid test identifies those skills important to a particular job and tests those skills. On May 21, 1987, the District Court held that the new 1986 PCT was not content valid because it included a task that had an adverse impact on women candidates that was not critical to the performance of a firefighter, namely, the "hose hoist event." The District Court determined that absent this "noncritical task," the 1986 PCT was content valid. It then approved the use of the PCT without this task in selecting future firefighter classes. *Id.* It also directed the City to continue to hire male and female firefighters in proportion to their numbers in the pool of candidates that passed the

firefighter examination.

Moreover, the District Court established a minimum score or "cut" score that all persons taking the examination would have to achieve in order to pass the examination and be eligible for hiring. The cut score was designed to ensure that all persons on the lists of eligible candidates for firefighter were qualified for the position. The District Court found that under this cut score, 15 percent of the incumbent firefighters would fail the PCT. In an order issued on June 12, 1987, the District Court found that had a valid examination been given, a total of four women would have been hired from the 1984 examination, and, noting that the City had already hired three women from that class, it ordered the City to hire one more woman.

Subsequently, this Court dismissed all pending appeals and cross-appeals on the May 13 and 30, 1986 orders on the basis that the appeals were not from final

judgments and were moot to the extent that the City had complied fully with the District Court's injunctions. The parties then appealed and cross-appealed from the May 21, 1987 order. While that appeal was pending, the City filed with the District Court a detailed study called a concurrent criterion-related validity study prepared by an expert in industrial psychology, Dr. Frank J. Landy, which purported to validate strict rank-order hiring. No hearing regarding this study was held at this time.

On September 7, 1988, the Brunet plaintiffs filed a motion for contempt against the City alleging that the City had administered the hose hoist event as part of the PCT. While the appeals from the May 21, 1987 order and the contempt motion were pending, the City initiated settlement discussions with the Brunet plaintiffs that culminated in the consent decree of February 27, 1989.

Paragraph 12 of the consent decree provides:

> The City and the Safety Director shall continue to appoint male and female applicants in proportion to the relative proportions of males and females achieving passing scores on the firefighter entry level test as a whole, for a period of at least 20 years from the date of this Order. The number to be hired if a fraction shall be rounded up to the next whole number.

The decree also provided that both the CAT and the PCT would be scored on a pass/fail basis and that the minimum "cut" score required by the District Court would be used to determine which candidates had passed the entire examination and were eligible for hiring. Consent decree, ¶¶ 2, 11. The City also agreed to withdraw its concurrent criterion-related validity study on rank-order hiring, although the District Court had neither examined nor ruled on the study. This consent decree was entered into by the parties and approved by the District Court without a public hearing.

B.

Tucker Litigation

The Tucker plaintiffs sat for the Spring 1990 firefighter examination. On July 26, 1991, Tudor, Meyer and Tucker filed a complaint raising a section 1983 challenge to the hiring pursuant to the consent decree on equal protection grounds. The complaint also requested class certification on behalf of all similarly-situated males. The complaint was amended on August 27, 1991, to, inter alia, add Hilleary as a named plaintiff. On March 18, 1992, the District Court held that the consent decree discriminated against the Tucker plaintiffs on the basis of their gender in violation of the Equal Protection Clause. Consequently, the District Court set aside the consent decree and enjoined the City from selecting firefighters in the manner provided by the consent decree. A timely appeal followed. However, the District Court reserved for future

consideration the validity of rank-order hiring, *i.e.*, whether there is a linear relationship between test scores on the PCT and job performance.

Subsequently, the District Court entertained further evidence in a hearing on May 21, 1992, on the issue of strict rank-order hiring. To support its argument that strict rank-order hiring based on the current firefighter examination is valid, the City resubmitted the concurrent criterion-related validity study prepared by Dr. Landy. Based on this study, the District Court determined in its memorandum opinion of July 24, 1992, that a higher score on the PCT is likely to result in better job performance, and that therefore the test results could be used to select new firefighters in order of their PCT scores. The court also concluded that there existed no comparable test that had a lesser disparate impact on female candidates. It also modified its May 21, 1987 preliminary order to allow the City to hire firefighters in

strict rank order from a single list comprised of males and females. The court further directed that the ranking be based on the passing candidates' combined scores on the PCT and the CAT, giving equal weight to each. The Brunet plaintiffs also timely appealed this order.

Thereafter, on September 23, 1992, the District Court ordered that all male applicants hired from the 1990 test receive seniority ahead of the two female firefighters, Fox and Sachs, who had been hired from the 1990 examination. The District Court based this decision on the fact that both of the two female firefighters' test scores were lower than the scores of all the males hired from the 1990 examination. On September 24, 1992, the District Court entered a final judgment in favor of the Tucker plaintiffs. On October 19, 1992, the Brunet plaintiffs filed a notice appealing from the District Court's final judgment of September 24, 1992, and from the District Court's orders of May 13, 1986, May 30, 1986,

and May 21, 1987. All of the appeals were consolidated.

II. STANDING

A.

The Brunet plaintiffs challenge the Tucker plaintiffs' standing to bring their action and to act as class representatives. If they lacked standing, then the District Court had no case or controversy over which it, or we, may exercise federal jurisdiction. "The constitutional power of federal court cannot be defined, and indeed has no substance, without reference to the necessity 'to adjudge the legal rights of litigants in actual controversies.'" *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Liverpool S.S. Co. v. Commissioners of Emigration,* 113 U.S. 33, 39 (1885)). The doctrine of standing serves to identify those disputes that satisfy the case-or-controversy

requirement of Article III. The party invoking federal jurisdiction bears the burden of establishing standing to sue. *Warth v. Seldin,* 422 U.S. 490, 508 (1975).

First, the plaintiff must have suffered an "injury in fact." The Supreme Court has made clear that the injury must be "concrete and particularized' and 'actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130, 2136 (1992). If the injury is not actual, but imminent, the plaintiff cannot simply allege possible injury at some indefinite, future time. *Whitmore v. Arkansas,* 495 U.S. 149, 158 (1990). The Supreme Court acknowledges that "'imminence' is concededly a somewhat elastic concept," but stresses that the purpose of the requirement "is to insure that the alleged injury is not too speculative for Article III purposes -- that the injury is '*certainly* impending.'" Lujan, 112 S. Ct. at 2139 n.2 (quoting *Whitmore,* 495 U.S. at 158). Next, the litigant must show that the injury

is "fairly ... trace[able] to the challenged action" and "is likely to be redressed by a favorable decision." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41, 38 (1976).

In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), a non-minority medical school applicant challenged the University's affirmative action program. The Court found that Bakke did not have to show that in the absence of the program he would have been admitted to medical school. The Court found injury "in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race." *Id.* at 281 n. 14. Thus, in the context of affirmative action programs, the challenger need only show that, but for the program, he would have been considered for the job, to satisfy standing requirements. The United States Supreme Court recently reaffirmed this principle in *Northeastern Florida Chapter of the*

Associated General Contractors of America v. City of Jacksonville, 61 U.S.L.W. 4626, 4629 (U.S. June 14, 1993):

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

The Brunet plaintiffs argue that none of the named plaintiffs in the Tucker action have standing to challenge the consent decree because the decree caused no harm to any of the named Tucker plaintiffs and because any case or controversy that existed was mooted before class certification. Further, they argue that any threatened future injury was not imminent, but rather was speculative at the time the court ruled on the certification issue.

The Columbus City Charter requires the City to hire entry level firefighters according to the "Rule of Three." Under the Rule of Three, the Columbus Civil Service Commission presents the Director of Public Safety the three highest ranking candidates for each position from a certified list; the Director may choose any one of the three. In addition to passing the firefighter examination, eligibility is also dependent upon the applicant successfully passing a background investigation, physical examination and polygraph test. An applicant who passes these additional requirements is then ranked on a certified list. Not all applicants passing the civil service exam appear on the certified list.

In order to hire in proportion to the males and females who passed the test, the City maintained separate lists for males and females. The female and male candidates who passed the examination were then ranked on their respective lists according to their scores

on the CAT and the PCT.[3] However, for informative purposes, one overall list that grouped males and females together and ranked each candidate on the basis of his or her score was also maintained. On the overall list for the Spring 1990 examination, Tudor ranked 108, Meyer ranked 110, Hilleary ranked 120, and Tucker ranked 176. The first firefighter class hired from the 1990 eligibility list was the March, 1991 class. By operation of the consent decree, this class consisted of 33 men chosen from the top 50 men appearing on the certified list and 3 women. Due to their placement on

---

[3] We note that while the consent decree provides for the pass/fail administration of the physical and cognitive portions of the examination, the City actually scored the results of both tests and used the scores to create two rank-ordered lists to comply with the proportional hiring requirement of the consent decree. The consent decree did not require this result. The City could have used another method of choosing candidates from the male and female pools of applicants other than maintaining dual rank ordered lists, *e.g.*, a lottery system.

the overall eligibility list, none of the named plaintiffs were eligible for consideration or entry in this class.

In the Summer of 1991, the City prepared to hire another class of 36 firefighters from the 1990 examination list. Pursuant to the consent decree, this class was to consist of the top 34 ranked and qualified men and 2 women. The named plaintiffs were ranked as follows on the certified list for the August, 1991 class:

Tudor:	36
Meyer:	38
Hilleary:	44
Tucker:	Not included on this list.

In the absence of the consent decree, 36 men would have been hired for this class. On the overall list, with one exception,[4] no female candidate ranked higher than

---

[4] One woman, Darrylee Potter, who ranked 142, was ranked higher than Tucker. Ms. Potter had been hired in the March, 1991 class.

any of the Tucker plaintiffs. Hence, in the absence of the consent decree, and in light of the Rule of Three, both Tudor and Meyer would have been considered for a position, and Tudor would probably have been selected.[5]

After receiving notice of the Tucker plaintiffs' intent to sue the City, the City Attorney made an offer to Tudor and Meyer to expand the August, 1991 class from 36 to 38 firefighters in order to include them both. Tudor and Meyer rejected the offer and filed their complaint and a motion for a temporary restraining order challenging the constitutionality of the consent decree the next day. The District Court granted the Tucker plaintiffs' motion

---

[5] Even if the first 35 ranked applicants were chosen for the first 35 positions, candidates 36, 37 add 38 would have been considered for the 36th position. Tudor and Meyer need not show that they would have been selected for the position, but for the consent decree, only that they would have been considered. *See Bakke,* 438 U.S. at 280-81 n.14.

to intervene in the Brunet proceedings and consolidated the two cases.

On July 30, 1991, the District Court granted a temporary restraining order enjoining the operation of the consent decree. The Brunet plaintiffs appealed the District Court's grant of the temporary restraining order and sought an emergency stay from the District Court, which it denied on August 15, 1991. The Brunet plaintiffs then sought an emergency order from this Court, which stayed the District Court's temporary restraining order on August 16, 1991. Additionally, we ordered that, pursuant to the City's offer, the class that would begin training on Monday, August 19, 1991, would be expanded from 36 to 38 firefighters and include Tudor, Meyer, Vicki Fox, and Denise Sachs.

On August 17, 1991, the Tucker plaintiffs sought and received an ex parte order from the District Court temporarily restraining the City from proceeding with its

training class on August 19, 1991, until August 20, 1991, in order that this Court might have an opportunity to reconsider the August 16, 1991 order. On August 19, 1991, this Court granted a second emergency stay pursuant to the Brunet plaintiffs' motion, and the class of firefighters scheduled to begin training on August 19, 1991, commenced on August 20, 1991, with Sachs, Fox, Meyer, and Tudor in attendance. Thereafter, this Court dismissed the Brunet plaintiffs' appeal from the temporary restraining order as moot in light of the commencement of the hiring class.[6]

The Tucker plaintiffs filed their motion to certify a class on September 19, 1991. On November 25, 1991, the District Court certified the Tucker plaintiffs' action as

---

[6] Shortly after this series of orders and appeals, the Brunet plaintiffs filed a motion requesting that Judge Kinneary disqualify himself for bias. The court denied this motion. On the same day, August 22,1991, Judge Kinneary did recuse himself *sua sponte* and Judge Graham was assigned to the case.

a class action pursuant to Federal Rule of Civil Procedure 23(b)(2). The class certified consisted of all males who desired to be in the August, 1991 training class and in future training classes for entry-level firefighters but who would be precluded from such positions or would lose seniority solely on the basis of gender as a result of the consent decree in the *Brunet* case. In the same order, the District Court addressed the issue of standing. While we agree with the District Court that the Tucker plaintiffs have standing to bring this action, our reasons are other than those given by the District Court.

B. Hilleary and Tucker

The District Court determined that the controversy between Hilleary and Tucker and the City was "very much alive" because "[a]t this point, they have not been hired as firefighters, and they may well be affected in the future by the operation of the 1989 order.' To the

extent that the court was referring to their being hired or not, this determination was in error. Tucker was not on the certified list for the August, 1991 class. Thus at this time, Tucker was not eligible for consideration. Moreover, Tucker's low rank would have eliminated him from consideration for the August, 1991 class. The record is silent as to whether he would appear on the next certified list. Any future injury to him was merely speculative and does not satisfy the Supreme Court's "imminence" requirement of the standing doctrine in cases of future injury. *Lujan,* 112 S. Ct. at 2136.

Similarly, the consent decree did not adversely affect Hilleary's selection to the August, 1991 training class. The Tucker action challenged the operation of the consent decree from August 1991 forward.[7] Assuming

---

[7] In their complaint, the Tucker plaintiffs made the following assertions:

> The plaintiff class consists of all males who desire to become Columbus

arguendo that the City would have still hired a class of 38 even in absence of the consent decree, the facts

---

> firefighters in the August 19, 1991 class, or in subsequent entry-level firefighter classes, and who are affected by the discriminatory practices described herein....
>
> Although two firefighter positions are at issue for the firefighter class commencing August 19, 1991, the plaintiff class is much broader than simply two persons since it includes all persons who will be affected by the discriminatory practices over approximately the next eighteen years. The plaintiff class includes males who desire to become Columbus firefighters in future classes, and who are or would be affected by the discriminatory practices described herein either in respect of hiring or in respect of their seniority within the Division of Fire.

Tucker Complaint, ¶¶ 12, 13. The action did not reach back to the hiring that took place in March of 1991. The men who lost their position to the women hired in Mach, 1991 are not part of the Tucker class. Indeed, the women's placement in the March, 1991 class pursuant to the consent decree is not challenged. Therefore, we do not include the March, 1991 hiring in our analysis of the effect of the consent decree on the Tucker plaintiffs in August, 1991.

show that the last candidate hired was Meyer, number 38. Under the Rule of Three, the City still would have only reached candidate 40 in its consideration for the 38th position in the class; Hilleary ranked 44. Moreover, looking to the facts known to the court at the time it was ruling on the certification motion, unless Hilleary was eliminated for another reason, he would be hired in the next class regardless of the consent decree.

C. Tudor and Meyer

The same was true of Tudor and Meyer, *i.e.*, their date of hire was not affected by the consent decree because they would have been hired in the August, 1991 class whether it was in effect or not. In class actions, standing must exist both at the time the complaint is filed and at the time the class was certified. *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). At the time the complaint was filed, July 26, 1991, it appeared the operation of the consent decree would prevent Tudor

and Meyer from being considered for admission into the August, 1991 class because of their gender. Thus, at the time of the complaint, Tudor and Meyer faced imminent injury and had standing to bring the lawsuit.

"Settlement of a plaintiff's claims moots an action." *Lusardi v. Xerox Corp.*, 975 F.2d 964, 974 (3d Cir. 1992) (citing *Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120 (1985); *Hammond Clock Co. v. Schiff*, 293 U.S. 529 (1934); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3533.2, at 233 (1984)). When Tudor and Meyer entered the August, 1991 class, their claims that they should have been hired became moot. Admittedly, special mootness rules exist for class actions. *Once a class is certified,* the mooting of the named plaintiff's claim does not moot the action, the court continues to have jurisdiction to hear the merits of the action if a controversy between any class member and the defendant exists. *Sosna,* 419

U.S. at 399. Where, on the other hand, the named plaintiff's claim becomes moot before certification, dismissal of the action is required. *Board of School Commn'rs v. Jacobs,* 420 U.S. 128 (1975) (per curiam); *Lusardi,* 975 F.2d at 974; *Tucker v. Phyfer,* 819 F.2d 1030, 1035 (11th Cir. 1987); *Sannon v. United States,* 631 F.2d 1247, 1252 (5th Cir. 1980). Since Tudor and Meyer entered the class before even filing the certification motion, neither Tudor nor Meyer had standing to contest the hiring procedures at the time of certification.

The District Court relied on *Deposit Guaranty National Bank v. Roper,* 445 U.S. 326 (1980), and *United States Parole Commission v. Geraghty,* 445 U.S. 388 (1980), to find that Tudor and Meyer have standing in this action. However, the holdings in these cases are limited to the question of a proposed class representative's right to appeal the denial of class certification and are

inapplicable to the present case.

> We merely hold that when a District Court erroneously denies a procedural motion, which, if correctly decided, would have prevented the action from becoming moot, an appeal lies from the denial and the corrected ruling "relates back" to the date of the original denial.... The "relation back" principle, a traditional equitable doctrine applied to class certification claims in *Gerstein v. Pugh*, 420 U.S. 103 (1975), serves logically to distinguish this case from the one brought a day after the [named plaintiff's claim on the merits expires].... If the named plaintiff has no personal stake in the outcome at the time class certification is denied, relation back of appellate reversal of that denial still would not prevent mootness of the action.

Geraghty, 445 U.S. at 406-07 n.11. In both *Roper* and *Geraghty*, the class representatives had a personal stake in the controversy at the rime the court certified the action. Subsequent to the certification, their claims became moot.

In contrast, Tudor and Meyer had no personal stake in the hiring procedures at the time the District Court certified the class. We do not read *Roper* and *Geraghty* as doing away with the requirement that the proposed

class representative have standing at the time of class certification.

The District Court also relied on *Roper* for the proposition that the City cannot "buy off" the named plaintiffs' claims in order to avoid certification. Again, however, *Roper* concerns the "voluntary cessation" issue in the limited context of the attempt to moot a class representative's claims, after certification is denied, that operates to prevent *appellate review* of the denial of that certification. Additionally, unlike in *Roper,* Meyer and Tudor ultimately accepted the City's settlement offer by entering the August, 1991 class. Thus, both *before the motion to certify was even filed* and at the time the court certified the class, neither Meyer nor Tudor had a personal stake in being hired. Moreover, the *Roper* Court emphasized the importance of the factual context in which the case arose. In *Roper,* the plaintiffs never accepted the defendant's

settlement offer as satisfaction of their substantive claims. The Court found that "[n]either the rejected tender nor the dismissal of the action over plaintiffs' objection mooted the plaintiffs' claim on the merits so long as they retained an economic interest in class certification." *Roper,* 445 U.S. at 333. In the present case, Tudor and Meyer's claims were not mooted by the City's settlement offer or by this Court's order to expand the class. Their hiring claims were mooted, however, when Tudor and Meyer entered the August, 1991 class.

Some courts have held that a case does not become moot where a defendant "picks off" the claims of named plaintiffs with settlement offers in an attempt to avoid a class action. "If a tender made to the individual plaintiff while the motion for certification is pending could prevent the courts from ever reaching the class action issues, that opportunity is at the mercy of a defendant, even in cases where a class action would be most

clearly appropriate." *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 870 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1980). However, these cases are limited to the situation where "a motion for class certification has been pursued with reasonable diligence and is then pending before the district court." *Id.*; see also *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1051 (5th Cir. 1981). In the present case, there was no motion for certification pending when the City made its settlement offer. Moreover, Tudor and Meyer accepted the offer before a motion was even filed. We conclude that it was error for the District Court to have based the standing of Tudor and Meyer on the *Geraghty* and *Roper* decisions.

D. Loss of Seniority Rights

Plaintiffs Tudor, Meyer, and Hilleary did, however, sustain an actual "concrete and particularized" injury in their loss of seniority rights to female firefighters hired

pursuant to the consent decree.

> Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation.... Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ("competitive status" seniority) and to compute noncompetitive benefits earned under the contract of employment ("benefit" seniority).... We have already said about "competitive status" seniority that it "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." *Humphrey v. Moore,* 375 U.S. 335, 346-347 (1964). "More than any other provision of the collective[-bargaining] agreement ... seniority affects the economic security of the individual employee covered by its terms." Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1535 (1962).

Franks v. Bowman Transp. Co., 424 U.S. 747, 766 (1976).

> Seniority within the [Columbus] Division of Fire is determined by date of appointment. This is important in any firefighter's career for a number of reasons including pay, pensions, vacation time, "Kelly Day" (or days-off work) selection, and promotions. Seniority points are awarded for years of service, which are then added to a firefighter's competitive score on promotion examinations; in case of a tie or close finish the more senior person

thus obtains the promotions.

1991 Joint Stipulations, ¶ 10. It is true that Tudor, Meyer, and Hilleary[8] were hired on the same date they would have been hired whether or not the consent decree was in effect. Therefore, their "benefit seniority" rights were not affected by the decree, and they are receiving the same pay, pension contributions and vacation time as they would have if the women had not been hired.

The Tucker plaintiffs' injury lies in their loss of "competitive status" seniority rights. The women hired in the August, 1991 class achieved a higher place on the CDF's seniority hierarchy than they would have in absence of the consent decree. Fox and Sachs would be less senior than Tudor, Meyer and Hilleary if not for

---

[8] At the time of class certification, Hilleary was certain to be hired in the next class absent unforeseen circumstances unrelated to his ranking. We note that Hilleary was in fact hired in the next class.

the consent decree. Hiring Fox and Sachs, whose test scores were lower than those of any of the Tucker plaintiffs, diminished the employment status of Tudor, Meyer, and Hilleary. This is because Fox and Sachs enjoy the same "competitive status" seniority rights as Tudor and Meyer, and greater rights than Hilleary. Tudor and Meyer have lost the advantage of having more seniority points than the women in a future competition for a promotion. They are harmed by having to compete on equal footing with persons who do not belong in their class. Hilleary has not only lost that advantage, but has been put at a disadvantage because he is less senior than Fox and Sachs. Moreover, when the City expanded the class from 36 to 38, Tudor and Meyer were put in the position of having to compete with two additional persons, and Hilleary, who was hired in the next class, was junior to two more people than he would have been in absence of the consent decree. We

hold that the diminution in employment status suffered by the Tucker plaintiffs is a legally cognizable injury for purposes of standing to challenge the City's hiring practices.

In *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900 (1989), AT & T adopted a facially non-discriminatory seniority system for an allegedly discriminatory purpose. The allegedly discriminatory effect of the new seniority system was not felt until a few years after its adoption, when female employees, who had lost seniority under the new system, were demoted. The Court faced the issue of "when the limitations period begins to run in a lawsuit arising out of a seniority system not alleged to be discriminatory on its face or as presently applied." *Id.* at 903. The Supreme Court held that the women were time barred from bringing a Title VII action to challenge the adoption of the system. The Court further held that "when a

seniority system is nondiscriminatory in form and application, it is the allegedly discriminatory *adoption* which triggers the limitations period." *Id.* at 911 (emphasis in original). In other words, the cause of action accrues upon the happening of the discriminatory act, even if the effects of the discriminatory act are not felt until a later time. *See Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 61 U.S.L.W. 4626, 4629 (U.S. June 14, 1993) ("The 'injury in fact' in an equal protection case of this variety [city contract set-aside program)] is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."); *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) ("proper focus is upon the time of the *discriminatory acts,* not upon the time at which the *consequences* of the acts became most painful" (emphasis in original) (quoting *Abramson v. University*

of Haw., 594 F.2d 202, 209 (9th Cir. 1979)). Thus, under *Lorance*, the Tucker plaintiffs do not have to wait until they lose out on a promotion to a woman that they would have received if the woman's date of hire had been later than theirs.

The Civil Rights Act of 1991, Pub. Law No. 102-166, 105 Stat. 1071 (1991) (the "Act"), provides additional support for this conclusion. November 21, 1991, was the effective date of the Act and thus, it was in effect on November 25, 1991, the date the class was certified. The Act provides in relevant part:

> [A]n unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

42 U.S.C.A. §2000e-5(e)(2) (West Supp. 1992). In

response to *Lorance*, Congress overruled the Court's holding that the adoption of the challenged seniority system is the sole triggering event. Section 2000e-5(e)(2) provides for the accrual of a cause of action when the consequences of the discriminatory act are felt by the plaintiff; it did not alter that portion of the decision recognizing that a cause of action accrues at the time of the discriminatory act. Thus, we hold that when the discriminatory act occurred, *i.e.*, when the decision was made to hire two women in the August, 1991 class, pursuant to the consent decree, Tudor, Meyer and Hilleary were injured and, therefore, have standing to sue.

III.

The Brunet plaintiffs argue that the Tucker plaintiffs never made a claim in their original or amended complaints for relief based upon the City entering into the February 27, 1989 consent decree and that

consequently, the District Court erred in determining that the City had intentionally discriminated against male applicants by entering into the consent decree. This argument is meritless. *See* Tucker plaintiff's amended complaint, ¶ 20. The consent decree forms the basis of the Tucker plaintiff's action, and the Brunet plaintiffs should have been aware of this during the proceedings below. Because this issue was not raised before the District Court, it is considered abandoned on appeal and is not reviewable. *See Boyd v. Ford Motor Co.,* 948 F.2d 283, 284 (6th Cir. 1991), *cert. denied,* 112 S.Ct. 1481 (1992); *First State Bank v. City & County Bank,* 872 F.2d 707, 715 n.5 (6th Cir. 1989). The Brunet plaintiffs also argue that any claim regarding the consent decree is barred by the applicable two-year statute of limitations. This argument is an affirmative defense and must be pled. See Fed.R.Civ.P. 8(c). Having raised this argument for the first time in this

appeal, the Brunet plaintiffs have waived this affirmative defense. *See id.,; Great Southwest Life Ins. Co. v. Frazier,* 860 F.2d 896, 903 (9th Cir. 1988). *See also Hoover v. Langston Equip. Assocs., Inc.,* 958 F.2d 743, 744 (6th Cir. 1992) ("Under normal rules of pleading, the statute of limitations is an affirmative defense and must be raised in the answer." (quoting 5 Wright & Miller, *Federal Practice & Procedure,* § 1308, at 695 (1990).

IV.

Next we consider whether the District Court erred in determining that the terms of the February 27, 1989 consent decree discriminate against the Tucker plaintiffs in violation of the Equal Protection Clause. In determining that the consent decree violated the Equal Protection Clause, the District Court stated in relevant part:

> [i]n *Croson,* 488 U.S. at 507, the Supreme Court held that race based set aside programs undertaken by municipalities are subject to strict scrutiny and

> that to satisfy the Equal Protection Clause, they must be "narrowly tailored to remedy prior discrimination." Gender based preferences are likewise subject to strict scrutiny under the Equal Protection Clause.

The District Court noted that the Brunet plaintiffs in their underlying claim had failed to prove intentional discrimination by the City against female applicants and further stated that "[t]he only finding of discrimination against women was the finding that the PCT portion of the 1984 entrance examination had an adverse impact against women and that the City had failed to show that it was job related." The District Court further stated that:

> [a]lthough the *Brunet* plaintiffs argue that the consent decree is supported by past and present disparity of women in the position of firefighter, neither the City nor the Brunet plaintiffs attempted to prove past discrimination with evidence of disparity in the present [consolidated] proceedings. The Court in the original *Brunet* case apparently did not accept plaintiffs' claims in that regard. In any event, mere statistical imbalance alone would not suffice. *Croson,* 488 U.S. at 501; *Hazelwood School District v. United States,* 433 U.S. 299 (1977). There was no evidence introduced here or in the original *Brunet* case which would justify a

> finding of a pattern or practice of discrimination against women. There was no evidence that the City itself had made any determination of past discrimination as the predicate for an affirmative action program for the hiring of female firefighters.

The District Court concluded that "[b]y agreeing to this order, the City has intentionally discriminated against male applicants" and that "[t]he consent decree violates the Equal Protection rights of male applicants...because it is not narrowly tailored to remedy the prior discrimination found in *Brunet*."[9]

A.

First, the Brunet plaintiffs argue that the District Court erred in subjecting the consent decree to the strict scrutiny standard of review. In *Mississippi Univ. for*

---

[9]The City seeks to challenge the District Court's finding that it intentionally discriminated against the male plaintiffs by agreeing to the February 27, 1989 consent decree. The City admits it has not filed a notice of appeal from the District Court's March 18, 1992 order, and we therefore lack jurisdiction to consider the City's challenge. See e.g., Torres v. Oakland Scavenger Co., 487 U.S. 312, 315 (1988).

Women v. Hogan, 458 U.S. 718, 724 (1982), the Supreme Court applied an intermediate standard of review to the university's decision not to admit a male applicant to the nursing school solely on the basis of his gender. The Court examined this gender preference to determine if it possessed an important governmental objective and means substantially related to the achievement of the objective. *Id.* However, in *Conlin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989), we relied on *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), to apply the strict scrutiny standard to an affirmative action plan based on a gender classification. Under the precedent in this Circuit, gender based affirmative action plans are subject to strict scrutiny when challenged under the Equal Protection Clause. Both we and the District Court are bound by the prior decision of this Court in *Conlin*. *But*

see Coral Constr. Co. v. King County, 941 F.2d 910, 931 (9th Cir. 1991) (applying intermediate scrutiny to gender based affirmative action plan), *cert. denied,* 112 S.Ct. 875 (1992).

The Brunet plaintiffs also argue that the consent decree embodies a "gender conscious" plan, which should be subjected to the intermediate standard of review, rather than a "gender preference" plan, which is subjected to the strict scrutiny standard. They rely on *Jacobson v. Cincinnati Board of Education,* 961 F.2d 100, 102 (6th Cir.), *cert. denied,* 113 S.Ct. 94 (1992), in which we employed the intermediate level of scrutiny because the school board's transfer policy was race neutral, had no disparate impact on any race, and was thus, "race conscious" as opposed to being a "racial preference."

Under the consent decree, some females with lower scores are hired before males with higher scores. The

District Court later held (a holding that we affirm below) that applicants scoring higher on the test are better qualified than those with lower scores. Most importantly, the City knew at the time it entered into the consent decree that this was the case. Thus, the consent decree contains a gender preference since it requires that some lesser qualified women be hired before better qualified men.

B.

The Brunet plaintiffs next argue that the District Court erred by placing the burden of proof upon them and the City to prove the constitutionality of the consent decree by producing evidence of past discrimination against women by the CDF. Instead, the Brunet plaintiffs argue, the burden should have been on the Tucker plaintiffs to show an *absence* of prior discrimination on the part of the fire department against women.

Our decision in *United Black Firefighters Ass'n v. City*

of Akron, 976 F.2d 999 (6th Cir. 1992), is instructive. In *United Black Firefighters,* we considered the Equal Protection challenge of the local firefighters' union to the district court's order approving a consent decree between the United Black Firefighters Association ("UBFA") and the City of Akron. The consent decree was designed to increase the percentage of black firefighters promoted to the position of lieutenant in the Akron Fire Department. In considering this challenge, we first determined that the local union had successfully shown that the consent decree embodied a racial preference. *See id.* at 1007. Our focus then shifted to whether this racial preference survived equal protection analysis under the strict scrutiny standard as required by the Supreme Court in *Wygant* and *Croson.*

Both *Wygant* and *Croson* involved Equal Protection challenges to a public employer's affirmative action plan. We held that under *Wygant* and *Croson,* a state actor's

affirmative action plan survives strict scrutiny when (1) a preference, and (2) the preference is narrowly tailored to achieve that interest. We further held that, "[u]nder the first prong of the *Croson* test, a state actor possesses a compelling state interest when its concern is with remedying past discrimination." *United Black Firefighters,* 976 F.2d at 1009. We then considered whether the City and/or the UBFA had produced sufficient evidence of past discrimination within the City's fire department to provide a compelling governmental interest to support the affirmative action plan. *Id.* at 1010-11. In effect, once the local union proved a racial preference existed, the burden shifted to the defendants to produce evidence of past discrimination exists to support a compelling governmental interest in a racial preference where a "strong basis in evidence" of prior discrimination is shown. *Id.* at 1009; *see also Long v. City of Saginaw,*

911 F.2d 1192, 1196 (6th Cir. 1990).

The Brunet plaintiffs rely on *Johnson v. Transportation Agency,* 480 U.S. 616 (1987), to support their position that the Tucker plaintiffs must prove the absence of prior discrimination. However, the crucial distinction between *Johnson* and the present case is that in *Johnson,* the attack on the affirmative action plan at issue was based on Title VII alone; there was no Equal Protection challenge to the plan. The obligations of a public employer under Title VIII and under the Constitution in regard to an affirmative action plan are not identical. *Id.* at 627 n.6. *Johnson* is simply not helpful in resolving this issue. Thus, the District Court did not err in placing a burden of production upon the City and the Brunet plaintiffs to show evidence of past discrimination by the CDF in hiring female firefighters once the Tucker plaintiffs showed that the consent decree embodied a gender preference. Of course, the

Tucker plaintiffs retain the ultimate burden of persuasion in proving the unconstitutionality of the consent decree. *Wygant,* 476 U.S. at 277-78.

C.

The Brunet plaintiffs next argue that even if strict scrutiny is applied to the consent decree, they have successfully shown a strong basis in evidence of prior discrimination by the CDF sufficient to support a compelling governmental interest in the consent decree. As part of their efforts to make such a showing, the Brunet plaintiffs now seek to appeal the District Court's May, 1986 orders in which the court held that the Brunet plaintiffs had failed to prevail on their intentional discrimination claim.

The Brunet plaintiffs had appealed the District Court's findings within 30 days of the entry of the orders, but we dismissed that appeal on the ground that no final judgment on that issue had yet been entered. The

Brunet plaintiffs concede that entry of the consent decree in this case could be construed as the final judgment on their claims.

When the Brunet plaintiffs entered in the February 27, 1989 consent decree with the City, they agreed to forego all appeals from previous decisions of the District Court. However, because the consent decree has been set aside and they no longer can enjoy the benefit of their bargain, equitable principles require that they be allowed to now raise on appeal issues mooted by the consent decree. In *Jansen v. City of Cincinnati,* 977 F.2d 238 (6th Cir. 1992), *cert. denied,* ____ S.Ct. ____, 61 U.S.L.W. 3771 (U.S. May 17, 1993), we stated that "[a] consent decree, although in effect a final judgment, is a contract founded on the agreement of the parties....It should be construed to preserve the position for which the parties bargained...." *Id.* at 241 (quoting *Vogel v. City of Cincinnati,* 959 F.2d 594, 598 (6th Cir.),

cert. denied, 113 S.Ct. 86 (1992)). Since the Brunet plaintiffs no longer have the benefit of their bargain, they are entitled to the benefits of their litigation. Accordingly, we address the Brunet plaintiffs' appeal from the District Court's 1986 determination that they failed on their section 1983 claim alleging intentional discrimination.

In *Brunet,* the District Court held that in view of the substantial evidence suggesting the absence of discrimination, plaintiffs had failed to prove intentional discrimination. In reaching this conclusion, the court relied on the City's extensive efforts at recruiting women and in preparing women for the examination, and that the women firefighters who were employed suffered no discriminatory treatment in their work. It acknowledged that prior to 1975, job announcements for firefighters were restricted to males and that only five of 832 firefighters were women. It noted that plaintiffs

presented evidence about bias against women on the part of the Director of the Training Academy. But it also noted that this bias led to his removal. Finally, it recognized that defendants were aware, at various times, of less discriminatory testing methods than those that they were employing, but refused to adopt them. The district judge did not discuss the change in testing that occurred in 1980 when determining the Brunet plaintiffs' intentional discrimination claim. In 1975, the first year women were included in the firefighter applicant pool, and in 1978, the City administered the PCT on a pass/fail basis and ranked all candidates in the order of their scores on the CAT. In 1980, the City decided to score the PCT and ranked the candidates based on their combined PCT and CAT scores. The PCT was weighted 30 percent and the CAT 70 percent. Later in the same opinion, Judge Kinneary observed that this change was made "without any apparent

consideration being given to possible greater adverse impact upon women." *Brunet,* 642 F. Supp. at 1236. The court's opinion does indicate that the purported reason for the change in approaches was a 1980 job analysis that concluded "that the work of firefighting was largely physical, and that better firefighters were distinguished by the ability to excel while performing physical tasks." *Id.* The Civil Service Commission adopted the report's recommendation that the PCT be made part of the ranking of job candidates. The court thus did not make an explicit finding that the City changed from a pass/fail to a scored PCT for legitimate non-discriminatory reasons. However, we believe that this was implicitly found by the court, as the court was aware of the change and of the purported nondiscriminatory reasons for the change. We conclude that the District Court was not clearly erroneous in finding that the City did not intentionally discriminate

against women in the hiring of firefighters.

D.

The Brunet plaintiffs argue that they can still show a strong basis in evidence to support the need for the affirmative action program set forth in the consent decree. They contend that the District Court, in its March 18, 1992 order, erred in holding that in order to produce evidence sufficient to support the consent decree, there must be a formal judicial finding of past discrimination. The Tucker plaintiffs do not argue that the City could enter into the consent decree only if there was a judicial finding of past discrimination. Rather, there was a finding of no intentional discrimination, and the Tucker plaintiffs argue that the only finding of discrimination in the Brunet plaintiffs' underlying action was that the 1984 PCT had a disparate impact on women and that the test was not validated in violation of Title VII. Because this "singular" incident of

discrimination had already been remedied, there was not a sufficient basis to support the consent decree's affirmative action plan.

The Brunet plaintiffs are correct that a strong basis in evidence to support a public employer's affirmative action plan does not require a formal finding of past discrimination. *See Wygant,* 476 U.S. at 289-92 (O'Connor, J., concurring); see also United Black Firefighters," 976 F.2d at 1009; *Donaghy v. City of Omaha,* 933 F.2d 1448, 1459 (8th Cir. 1991), *cert. denied,* 112 S. Ct. 938 (1992); *Howard v. McLucas,* 871 F.2d 1000, 1008 (11th Cir.), *cert. denied,* 493 U.S. 1002 (1989). In fact, a prima facie case of intentional discrimination is sufficient to support a public employer's affirmative action plan. *See Croson,* 109 S. Ct. at 724; *United Black Firefighters,* 976 P.2d at 1010. Thus, less evidence is necessary to justify an affirmative action plan than is necessary to prevail on an individual or

class action claim of intentional discrimination. Given the disparity in the required evidentiary standards for each type of relief, a failure to prevail in a previous intentional discrimination claim does not preclude the Brunet plaintiffs from now attempting to show a strong basis in evidence to support the City's affirmative action plan.

The District Court noted in its March 18, 1992 order that there was no finding of intentional discrimination in the Brunet plaintiffs' 1986 trial. However, the District Court also stated that "[t]here was no evidence introduced here ... which would justify a finding of a pattern or practice of discrimination against women." This statement indicates that the District Court did not simply rely on the prior decision in the underlying Brunet plaintiffs' action in reaching its conclusion that insufficient evidence exists to support the consent decree. In light of this holding, we next examine the

evidence that the Brunet plaintiffs contend provides a strong basis in evidence of discrimination.

Appropriate statistical evidence setting forth a prima facie case of discrimination is sufficient to provide a strong basis in evidence to support a public employers' affirmative action plan. *See Croson,* 488 U.S. at 501; *United Black Firefighters,* 976 P.2d at 1010. The District Court stated that "[m]ere statistical imbalance alone would not suffice.' The District Court is correct. Rather, as we stated in *United Black Firefighters*:

> [t]he method generally used is to compare the minority percentage in the relevant statistical pool to the minority percentages in the group of persons selected for the position at issue. *See Croson,* 488 U.S. at 501-03, 109 S. Ct. at 725-26; *Hazelwood School District v. United States,* 433 U.S. 299, 308, 97 S. Ct. 2736, 2742, 53 L.Ed.2d 768 (1977); *Long,* 911 F.2d at 119. The relevant statistical pool is comprised of all persons qualified for the position at issue. Roughly the same percentage of minorities observed in the relevant statistical pool should also be observed in the group of persons selected for the position at issue. *Id.* Where a gross disparity exists between the expected percentage of minorities selected and the actual percentage of

> minorities selected, then prima facie proof exists to demonstrate intentional discrimination in the selection of minorities to those particular positions. *See Croson,* 488 U.S. at 501, 109 S. Ct. at 725; *Hazelwood,* 433 U.S. at 307-09, 311 n.17, 97 S. Ct. at 2741-42, 2743 n. 17....

976 F.2d at 1011.

The Brunet plaintiffs offer the following statistical evidence to support the consent decree. Two percent of all those who passed the 1988 firefighter examination were women. However, had it not been for the court ordered proportional hiring requirement, no women would have been hired from that examination list. Thirty-one females out of 519 or 6 percent passed the examination administered in 1990; however, had it not been for the consent decree, only one woman would have been hired. These statistics do indicate a significant disparity. Nevertheless, as we stated in *United Black Firefighters,* "a gross disparity is not conclusive as to a finding of discrimination, because

other factors unrelated to race may account for the disparity." *Id.* Therefore, those opposing the affirmative action plan may present evidence to rebut the inference, thus defeating the validity of the affirmative action plan. *See Stuart v. Roache,* 951 F.2d 446, 453 (1st Cir. 1991), *cert. denied,* 112 S. Ct. 1948 (1992).

The Tucker plaintiffs have presented evidence to rebut this evidence. The reason why only one woman would have been hired from the 1988 and 1990 firefighter examinations absent the proportional hiring requirement is that the PCT is used to rank candidates for hiring purposes and women perform much more poorly than men as a whole on the PCT. The PCT developed in 1986 is valid and, as we determine below, and as the City knew in 1987, rank-order hiring did not discriminate since the PCT and the CAT are both job-related methods of selecting the most qualified individuals for the position of firefighter. Thus, a factor other than

intentional discrimination against females accounted for the disparity.

The Brunet plaintiffs also note than in 1986, before the trial in their underlying claim, only 6 of 822 or .72 percent of the City's firefighter force were women and that these women had been hired only as a result of the affirmative action plan arising from *Dozier* designed to correct past discrimination against black candidates. However, this statistical information is not particularly helpful in showing discrimination or rebutting discrimination because there is no evidence of how many women desired the position, were qualified and yet were not hired. Moreover, the same reason for the small percentage of women on the fire force today explains why there were so few women on the force in 1986--the PCT has an adverse impact on women.

In its 1986 opinion, the District Court found that the 1980 examination did not have an adverse impact upon

women because men and women were hired at about the same rate in proportion to the numbers of males and females eligible for hire. The court declined to attach significance to the fact that all of the women hired were hired from the *Dozier* list. We think that this was error. We would find that the 1980 examination had an adverse impact upon women, because in absence of the *Dozier* one-for-one hiring requirement no women would have been hired. However, this discrimination had already been remedied as four women were in fact hired in 1980. We can safely assume that the women actually hired in 1980 were the most qualified women and would be hired first from a female list. Likewise, the discrimination that the court found to exist in the administration of the 1984 examination had also been remedied.

The Brunet plaintiffs are not limited to statistical evidence to support the consent decree. *United Black*

Firefighters, 976 F.2d at 1011. The Brunet plaintiffs refer to other evidence arising as early as 1975 to support the consent decree. The Tucker plaintiffs argue that the consent decree cannot be supported by evidence arising outside the statute of limitations for the Brunet plaintiffs' underlying claim. The Tucker plaintiffs rely on *Campbell v. Dayton,* No. C-3-89-098, slip op. at 8 n.7 (S.D. Ohio Dec. 9, 1991), in which the district court held that the plaintiffs' claim under Title VII for disparate treatment could not concern acts occurring outside the applicable two-year statute of limitations. This case does not support the Tucker plaintiffs' position because the *Campbell* plaintiffs were seeking relief under Title VII and 42 U.S.C. §§ 1981 and 1983.

In contrast, the Brunet plaintiffs have introduced evidence for the purpose of justifying a public employer's affirmative action program, not for the purpose of prevailing on their Title VII and section 1983

claims. This distinction is important since an affirmative action program serves a very different purpose than does a claim brought under Title VII or section 1983. As the Supreme Court stated in *Local 28 of Sheet Metal Workers v. EEOC,* 478 U.S. 421, 474 (1986):

> [t]he purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members; no individual is entitled to relief, and beneficiaries need not show that they were themselves victims of discrimination.

In this connection, we as well as other courts have considered evidence of prior discrimination occurring years before the affirmative action plan at issue. In *Vogel,* 959 F.2d at 600, we considered evidence as far back as eight years before the underlying claim was filed and nine years before the affirmative action plan at issue was instituted, in upholding an affirmative action plan that provided racial preferences. *See also Stuart,*

951 F.2d at 452 (considering evidence of discrimination occurring eight years before the underlying claim was filed and ten years before the affirmative action plan at issue was instituted).

The Tucker plaintiffs also argue, relying on *Quirin v. City of Pittsburgh*, 801 F. Supp. 1486 (W.D. Pa. 1992), that evidence occurring before 1972, when Title VII was made applicable to state and local governments, cannot be considered to justify an affirmative action plan. However, *Quirin* does not stand for this proposition. The district court in *Quirin* found that the only evidence of discrimination against women by the City of Pittsburgh occurred prior to 1972 and that this evidence was too remote in time from the affirmative action plan implemented in 1987 to provide a sufficient evidentiary basis to support it. *See id.* at 1492; *see also Howard*, 871 F.2d at 1007 (considering evidence of discrimination occurring in 1971 to support, in part, the

affirmative action plan at issue). Consequently, we may consider evidence occurring prior to 1972 and outside the statute of limitations applicable to the Brunet plaintiffs' Title VII and section 1983 claims. The question remains, however, whether this evidence constitutes a "strong basis in evidence" to support the consent decree at issue.

The strongest evidence of discrimination against women at the CDF is the testimony of Dr. Kriska, the City's expert who has been in charge of testing of firefighters since 1974, that prior to 1975 the City's job announcements for the position of firefighter specified "males." This designation would clearly indicate that the City preferred, if not required, males over females for this position and would have the effect of discouraging women from applying for the job. However, the District Court found in *Brunet* that there was "substantial evidence" that the City made efforts to encourage

women to apply for the job of firefighter after 1975. 624 F. Supp. at 1223. While evidence of discrimination prior to 1975 may be considered, it is conduct that occurred at least 14 years before the February 27, 1989 consent decree was entered. In *Hammon v. Barry,* 826 F.2d 73, 76-77 (D.C. Cir.), *order granting reh'g en banc,* 833 F.2d 367 (D.C. Cir. 1987), *order granting reh'g en banc vacated,* 841 F.2d 426 (D.C. Cir.), *cert. denied,* 486 U.S. 1036 (1988), the Court held that discriminatory conduct occurring 18 years prior to the institution of the affirmative action plan at issue was insufficient by itself to justify the plan under Title VII standards. *See also Fountain v. City Of Waycross,* 701 F. Supp. 1570, 1577 (S.D. Ga. 1989) (if the discrimination is sufficiently remote, it will not create compelling interest).

In this case, the discriminatory policy against women in the Columbus fire department prior to 1975 is too remote to support a compelling governmental interest to

justify the affirmative action plan embodied in the consent decree. In sum, the affirmative action plan, which provides preferential hiring to females, is not supported by a strong basis in evidence of prior discrimination sufficient to pass constitutional muster -- any discrimination against women caused by adverse impact has been remedied, and the intentional discrimination against women that occurred prior to 1975 is too remote. Further, the Brunet plaintiffs have offered no direct evidence of any intentional discrimination against women on the part of the City after 1975. Since 1987, the City has known that the PCT is job related and that a better score on the PCT and the CAT indicates a more qualified candidate. Thus, since 1987, the PCT's adverse impact on women has been justified by non-discriminatory job related reasons. In the absence of a "compelling governmental interest," *i.e.*, any prior unremedied or current

discrimination, the City had no constitutional basis on which to enter into the consent decree, which provided for the hiring of lesser-qualified women and denied men the opportunity to compete for all firefighter positions. By doing so, the City has intentionally discriminated against male applicants because of their gender. We affirm the District Court's holding that the consent decree violates the Equal Protection rights of male applicants for the entry level position of firefighter. Because, the plan is unsupported by a compelling governmental interest, it is unnecessary for us to consider whether the plan is narrowly tailored as required under *Croson*.

V. RANK-ORDER HIRING

The District Court determined that a linear relationship between test scores on the PCT and success on the job exists. In other words, the District Court determined that higher scores on the PCT are indicative of greater

success as a firefighter. The District Court also determined that no comparable selection devices exist that are "substantially equally valid" as strict rank-order hiring and have less of a disparate impact on women. The Brunet plaintiffs challenge both of these determinations. The District Court based its conclusions primarily on the concurrent criterion-related validity study prepared by Dr. Landy in 1987. A criterion-related validity study seeks to show the correlation between one's score on a test and one's subsequent success on the job. In a concurrent criterion-related analysis, an employment test is given to incumbents who have already obtained the necessary job experience and have an established record of performance. The incumbents' test scores are compared to their success on the job to determine the degree to which the test successfully measures incumbents' job performances.

In conducting the study, Dr. Landy identified a

representative sample of incumbent firefighters who were given the PCT. He then gathered performance ratings from supervisors from these incumbents on eighteen different firefighting performance areas. Dr. Landy next calculated the correlation coefficients, or measures of association, between the incumbents' test scores and their performance ratings. Both Dr. Landy and the City's expert, Dr. Kriska, determined on the basis of this study that there was a sufficient correlation between test scores and job performance to support using the PCT for ranking purposes. The District Court agreed.

This conclusion is a factual finding reviewed only for clear error. *See Police Officers for Equal Rights v. City of Columbus,* 916 F.2d 1092, 1103 (6th Cir. 1990). "Ranking is a valid, job-related selection technique only where the test scores vary directly with job performance." *Williams v. Vukovich,* 720 F.2d 909, 914

(6th Cir. 1983). Where a test that has a disparate impact upon a protected class of people is shown to be content valid and valid for purposes of ranking, the plaintiff may still prevail under a Title VII claim if he or she can show that other tests or selection devices would also serve the employer's legitimate hiring interests and at the same time have a lesser adverse impact upon that protected class. *Police Officers,* 916 F.2d at 1096.

It is not disputed that the 1986 PCT is content valid. However, the Brunet plaintiffs argue that the PCT is not appropriate for ranking purposes. They point to what they believe are serious flaws in the concurrent criterion-related validity study that purport to show that the PCT is appropriate for ranking purposes.

The Brunet plaintiffs contend that the hose hoist event, a non-critical task, was considered by Dr. Landy in calculating the correlation coefficients for the PCT. An examination of Appendix K of the study seems to

indicate that this contention is correct. Appendix K provides the correlation coefficient between the PCT and overall job performance. The City's expert, Dr. Kriska, stated at trial that Appendix K was the crux of the concurrent criterion-related validity study and that he relied on the correlation coefficients in Appendix K most heavily in determining that ranking on the basis of the PCT was valid. In addition, the District Court also relied heavily on Appendix K in reaching its conclusion that ranking on the basis of the PCT is valid. The correlation coefficient for the hose hoist event is .42, a value higher than that for all the other events on the PCT. The correlation coefficient for the overall PCT is .29. Other courts have found such correlation coefficients to be predictive of job performance, thus indicating the appropriateness of ranking where the correlation coefficient value is .30 or better. *Clady v. County of Los Angeles,* 770 F.2d 1421, 1431-32 (9th

Cir. 1985), *cert. denied,* 475 U.S. 1109 (1986); *Boston Chapter of NAACP v. Beecher,* 504 F.2d 1017, 1024 n.13 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); *see also EEOC v. Atlas Paper Box Co.,* 868 F.2d 1487, 1502 n.24 (6th Cir.) (Cook, J. concurring in part and dissenting in part), *cert. denied,* 493 U.S. 814 (1989). The correlation coefficient for the overall PCT is only .29 with the hose hoist event and would most likely be even less without the hose hoist event. Additionally, the Uniform Guidelines provide that a test that "has a low correlation coefficient will be subject to close review if it has a large adverse impact." 29 C.F.R. § 1607.14B(6); *see also Clady,* 770 F.2d at 1432 ("[a]s a general principle, the greater the test's adverse impact, the higher the correlation which will be required"); *Atlas Paper Box,* 868 F.2d at 1502 n.24.

In rebuttal, the City and the Tucker plaintiffs argue that use of the PCT for ranking purposes can be

BEST AVAILA

justified on the basis of content validity alone and that because the PCT has been determined to be content valid, it is also valid for purposes of ranking. The Uniform Guidelines provide in relevant part:

> [w]here a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

29 C.F.R. § 1607.14C(9). However, the District Court in its May 27, 1987 opinion and order determined that despite the fact that the PCT was content valid, further studies such as a concurrent criterion-related validity study were required to determine the validity of the PCT for ranking purposes.

Next, the Tucker plaintiffs point out that the hose hoist event was performed last during the concurrent criterion-related validity study in order to prevent affecting other events. While this may be the case, the fact remains that the correlation coefficient for the hose

LE COPY

hoist event was still included in the correlation coefficient for the overall PCT. However, as the District Court noted, it was necessary to evaluate the conflicting testimony of two well qualified experts in the field of industrial psychology and it found the testimony of the Tucker plaintiffs' expert, Dr. Landy, more convincing than the testimony of the Brunet plaintiffs' expert, Dr. Cranny. The court noted that while Dr. Cranny had never prepared an examination for firefighters and had little experience in the testing of public safety personnel, Dr. Landy has had extensive practical experience in the development, validation, and administration of public safety personnel selection in promotion examinations. The court noted that Dr. Landy has studied the firefighter job first hand, living in fire houses and accompanying firefighters inside burning structures. The use of statistical data to validate an examination for ranking purposes is a complicated matter requiring a

high level of expertise. A district judge is entitled to rely on the opinion of one expert in examining questions requiring this type of expertise. *See Police Officers,* 916 F.2d at 1103.

Furthermore, under the Uniform Guidelines, the values for the correlation coefficients in Appendix K are all statistically significant. Under the Guidelines, the correlation coefficient must have a value of at least .05, which means that it would be expected to occur no more than five times out of a hundred by chance. 29 C.F.R. § 1607.14(b)(5). Where the correlation coefficient is statistically significant, the scores from the selection procedure are considered to possess a direct relationship to one's performance on the job. *Id.*

We hold that the District Court was not clearly erroneous in its determination that rank-order hiring is valid.

VI. ALTERNATIVE HIRING PROCEDURES

We next consider whether the District Court erred in determining that there were no alternative selection devices that have less of a disparate impact on females and are "substantially equally valid" methods of choosing qualified firefighters. Uniform Guidelines, 29 C.F.R. § 1607.3(B). It is undisputed that strict rank-order hiring has an adverse impact on female firefighter applicants. Under the auspices of Title VII, once the City has shown that the challenged test is job related, as the City has in this case, the burden shifts to the challengers to prove that the City was using the validated tests as a pretext for discrimination by demonstrating that other tests, without the adverse effects, would also serve the City's legitimate hiring interests. *Police Officers,* 916 F.2d at 1096.

The Brunet plaintiffs offer two alternatives. First, they suggest that the use of the PCT should be dropped

altogether because the correlation coefficient for the CAT as set forth in Appendix K indicates that it alone is more predictive of job performance than the combined PCT and CAT tests. The correlation coefficient for the CAT alone is .52 while the correlation coefficient for the combined test is .44. The District Court rejected this argument relying on Dr. Landy's testimony showing how the statistical data for the PCT and the CAT could be manipulated to make the PCT alone appear more predictive of success as a firefighter. The court also determined, based on a multiple regression analysis conducted by Dr. Landy, that the PCT was necessary to test those physical skills required to be a firefighter. The court concluded that without the PCT, those physical skills simply would not be tested, and thus, the CAT alone is not as effective in choosing qualified firefighters as is the PCT and the CAT combined. Because we find nothing in the record that leads us to

conclude that the District Court was clearly erroneous in this finding, we agree that the PCT cannot be completely eliminated from the firefighter examination.

The Brunet plaintiffs next suggest that the City should administer the PCT on a pass/fail basis and then rank candidates solely on the basis of their CAT scores, since the CAT does not have an adverse impact on women. The City utilized this procedure in its 1975 and 1978 firefighter examinations. Although the consent decree provided for the pass/fail administration of both the CAT and the PCT, men and women were ranked, albeit on separate lists, in the order of their combined CAT and PCT scores. The Brunet plaintiffs argue that there is no evidence indicating that the City was dissatisfied with any of the firefighters hired according to these procedures, implying that a pass/fail examination is a viable alternative to a scored examination. The District Court held that rank ordering is justified because

there is a direct correlation between performance on the PCT and performance on the job. We believe that the following conclusion is implicit in this holding: For the purpose of hiring the most qualified candidates, a procedure that selects from a pool of applicants who achieve a passing score on the PCT and who are ranked on the basis of the CAT alone, is not "substantially equally valid" to a procedure that chooses its hires from a pool of applicants ranked according to their scores on both the CAT and PCT. We agree.

The posture of this case at present differs from the more typical Title VII challenge to hiring devices. The *Brunet* plaintiffs initially brought a Title VII action against the City in 1984, which culminated in the consent decree that instituted the proportional hiring requirement. After the Tucker plaintiffs' successful challenge to the consent decree on constitutional grounds, the consent decree was set aside. The City

then indicated that in absence of the consent decree it wished *to rank order all candidates on one gender-neutral list.* However, under the Uniform Guidelines, 29 C.F.R. § 1607.3B, before implementing a process of strict rank-order hiring from one list, a process that has an adverse impact upon women, the City is obligated to *conduct its own investigation of viable alternatives* with lesser or no impact on the female applicants. "[B]efore utilizing a [selection] procedure that has an adverse impact on minorities, the City has an obligation pursuant to the Uniform Guidelines to explore alternative procedures and to implement them if they have less adverse impact and are substantially equally valid to rank ordering." *Officers for Justice v. Civil Service Commission,* 979 F.2d 721, 728 (9th Cir. 1992) (citing the Uniform Guidelines, 29 C.F.R. § 1607.3B). There is nothing in the record indicating the City *explored alternatives* to strict rank ordering or that the District

Court looked to see that the City had done so. We believe that this was error. We reiterate that a selection procedure that ranks only on the basis of CAT scores is not acceptable. However, we have found nothing in the record that requires the CAT and the PCT to be *weighted equally.*[10] In 1980 and 1984, the PCT constituted 30 percent of an applicant's score; the CAT weighed in at 70 percent. The City should be required to demonstrate why the CAT, which arguably is more predictive than the PCT, should not be weighted more than the PCT. We suspect that this change would result in less of an adverse impact on women, although it will not eliminate it. But as Judge Kinneary stated seven years ago when the Brunet plaintiffs' journey began:

> Title VII does not require employers to equalize the probabilities of hiring of the average members of two groups. Rather, it requires that actual

---

[10] It may be that in the voluminous record this issue was addressed, but we are unable to find it.

> individuals enjoy opportunities for employment free from discriminatory barriers.
>
> . . .
>
> It is not the province of the Court to determine whether women should be firefighters, or how many women should be firefighters. Rather, it is the Court's duty to evaluate a test in light of the standards set forth in Title VII. How many women should be firefighters can be decided only by the administration of a validated examination.

Brunet, 642 F. Supp. at 1228, 1150.

VII. REMEDY

Lastly, the Brunet plaintiffs assert that the District court erred in granting the remedy it did in its September 23, 1992 order. The District Court found that "an order adjusting the seniority of male and female firefighters hired pursuant to the 1990 Firefighters Examination is necessary and appropriate to provide the Tucker class of plaintiffs with complete relief... But for the consent decree of February 27, 1989, the members of the Tucker class would have been hired before Firefighters Fox and Sachs and would have greater

seniority than Firefighters Fox and Sachs." As a result, the District Court ordered that Fox's and Sachs' seniority be adjusted so that it is less than that of all males hired from the 1990 examination.

"A district court has 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *United States v. Paradise,* 480 U.S. 149, 183 (1987) (quoting *Louisiana v. United States,* 380 U.S. 145, 154 (1965)). It is within the sound discretion of the district court to fashion such a remedy. *Id.* at 183-84. However, the remedy must be narrowly tailored to address the discrimination at issue and take into consideration the interests of all parties affected by the remedy. *Id.* at 185.

The Tucker plaintiffs argue that the relief was appropriate because the practical effect of this

adjustment was that Fox and Sachs were placed in the seniority order they would have been in had they not been given a preference under the consent decree. The remedy in this action should be to put the Tucker plaintiffs in the same position they would have been in absence of the consent decree. The Brunet plaintiffs argue that the focus of the District Court's remedy is improperly placed on putting Fox and Sachs in the same or similar position that they would have been in the absence of the consent decree. Moreover, Fox and Sachs retain an important interest in their seniority. *See Oliver v. Kalamazoo Bd. of Educ.*, 706 F.2d 757, 763 (6th Cir. 1983) ("the Supreme Court has recently reiterated the 'overriding importance' of seniority provisions...."). "[T]o protect the strong expectations in these pervasive and important seniority rights, the remedy must be 'necessary,' not merely, 'reasonable' to vindicate the constitutional rights" of the victims. *Id.*

(citation omitted).

In this case, the fashioned relief does not go beyond remedying the effects of discrimination suffered by the Tucker plaintiffs. As discussed at length above, plaintiffs Tudor, Meyer and Hilleary and the class they represent were harmed by the fact that Fox and Sachs are either as senior or more senior than them. The only way to remedy their injury is to place Fox and Sachs lower in the seniority hierarchy than the Tucker class as they would have been in absence of the consent decree. Accordingly, we affirm the District Court's order of September 23, 1992, adjusting the seniority of firefighters Fox and Sachs.

VIII.

The District Court's order setting aside the consent decree is AFFIRMED. The District Court's order adjusting the seniority of firefighters Fox and Sachs is AFFIRMED. The District Court's order validating rank-

order hiring is REVERSED. The case is REMANDED for proceedings consistent with this opinion.

WELLFORD, Senior Circuit Judge, concurring. I concur with Judge Kennedy's analysis of the standing issue (and the general background discussion) set out in part I and part IIA, and with respect to Guy Tucker's standing set out in part IIB. I believe, however, that Joseph Hilleary may have suffered an actual injury to his interest in August of 1991. The consent decree affected hiring decisions from the same lists in March of 1991, as well as in the ensuing August. The parties did not discuss the effect on this particular factual circumstance upon Hilleary in their briefs, but I believe the cumulative application of the quota mandate adversely impacted upon him.

Because the consent decree required three females to be hired in march and two in August, five females

were elevated above Hilleary. Hilleary was ranked forty-fourth on the August certification list, but he would have been ranked thirty-ninth had the females not been advanced. Pursuant to the Rule of Three, when the decision was to be made for the thirty-eighty spot, Hilleary would have at least been *considered* for employment in the august, 1991 class. Under *Bakke*, this denial under the consent decree likely brought about injury to Hilleary given the following two assumptions. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (majority opinion).

I assume first that the City of Columbus would have chosen thirty-eight firefighters in August of 1991 without the challenge to the consent decree. To suppose otherwise would permit the City to moot the claims of Tudor and Meyer by hiring them, and at the same time enjoy the benefits of the contrary assumption that the City would have hired fewer firefighters had it not taken

this defensive action. The fact is that the City did hire thirty-eight firefighters in August.

Second, I assume that, absent the consent decree, Hilleary would have attained number thirty-nine on the hiring list in August of 1991. Without the consent decree, three men hired in front of Hilleary in August would presumably have been hired in March. Then in August, two more males (instead of two females) would have been hired. This effectively would have moved Hilleary from position forty-four to thirty-nine absent the consent decree. Thus, I disagree with the majority conclusion in part IIB that "the consent decree did not adversely affect Hilleary's selection to the August 1991 training class."

I also concur with the majority's analysis in part IIC of the opinion. As to part IID, since I cannot be sure that all firefighters, regardless of rank number or rating, who are hired on the same day or in the same class, do not

have the same seniority status, I cannot join in the majority's part IID discussion. If, in fact, the firefighters hired at the same time from the same class are given different seniority rankings, then I could join the majority's part IID, but that would be supposition on my part. I assume, in the absence of evidence to the contrary, that every member of the same class has the same date of appointment and the *same* seniority.

Regardless of the consent decree, Tudor's seniority rights, for example, would be inferior to thirty-six firefighters (the number of firefighters hired in March) and equal to thirty-eight (the number hired in August). Under the consent decree, three of the thirty-six are women rather than men, and two of the thirty-eight are women rather than men. Tudor does not suffer an injury because he must compete with women rather than with men. He does not suffer an injury merely because less qualified persons enjoy equal or similar

seniority rights.

I concur with the majority also in parts III, IV and V of the decision. Therefore, I agree with the majority that we must set aside the consent decree, and would affirm the district court order adjusting seniority. Finally, I concur with the majority decision to reverse the order validating rank-order hiring, and to remand in that respect for the reasons stated.

FILED JULY 24, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Ann Brunet, et al.,

Plaintiffs,

vs.

City of Columbus, et al.,

Defendants.

Case No. C2-84-1973
(Consolidated with
Case No. C2-91-0616)

JUDGE GRAHAM

MEMORANDUM OPINION,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In a previous Memorandum Opinion, Findings of Fact and Conclusions of Law, filed on March 18, 1992, the Court found that the consent decree of February 27, 1989 in Brunet v. City of Columbus violated the equal protection rights of male applicants for the entry level position of firefighter in the City of Columbus Public Safety Department, Division of Fire. The consent

decree was set aside and the City was enjoined from selecting firefighters in the manner provided therein.

The Court also made certain findings on issues relevant to the propriety of using the entry level firefighter examination for rank order hiring, i.e., hiring in order of score from highest to lowest rank, but withheld a final ruling on this issue pending the City's decision on the kind of selection procedure it would use in the future. At the same time the Court noted that it wished to hear additional expert testimony on two issues before ruling on the propriety of rank order hiring. Thereafter, the City indicated its intent to use the examination for rank order hiring. Thus, an additional hearing was held on May 21, 1992 to hear evidence on two issues, to wit: (1) the existence of a linear relationship between test results and job performance across the range of scores used to rank the candidates, and (2) whether one PCT test event, instead of six,

would adequately measure the physical requirements of the firefighter position with less adverse impact on female candidates. This opinion supplements the earlier opinion. In order to understand the terminology and abbreviations used herein and to fully comprehend the grounds for the Court's ruling on the ultimate issue, i.e., the propriety of the City's use of the entry level firefighter examination for rank order hiring of male and female candidates from one list, it will be necessary to refer to the earlier opinion.

In order to justify rank order hiring, the City must show that there is a linear relationship between test results and job performance across the range of scores used to select the candidates. If the relationship is not linear, then the differences in scores would not meaningfully measure differences in predicted job performance and would not be a valid basis for selecting between candidates. At the December 18, 1991

hearing, the Brunet plaintiffs' expert, Dr. Cranny, testified that in his opinion there was a lack of evidence of such linearity and that additional studies, such as the construction of scatter diagrams, were necessary to demonstrate it. The City's expert, Dr. Landy, took the position that the presence of a linear relationship throughout the entire range of scores was implicit in the high correlation coefficients between the test events and performance measures. In light of additional evidence, the Court now believes that Dr. Landy was correct. Nevertheless, the Court wanted the City to further address Dr. Cranny's concern in this area before the Court reached a final decision on the use of the PCT for rank order hiring.

In response to the Court's request for additional evidence, Dr. Landy performed a statistical test referred to as a "trend analysis" to determine whether or not there was a curvilinear trend in the data. If, as Dr.

Cranny feared, the relationship between test scores and job performance tended to flatten out at the higher range, where the scores were used to select between applicants, such a phenomenon would occur only if there was a curvilinear trend in the data. Landy's additional statistical analysis revealed no such curvilinear trend. Landy also prepared scatter diagrams of the data to see whether they would provide any aid in determining linearity, and he found, as he earlier suspected, that they did not provide any useful information.

Landy further testified that the professional literature in the field of industrial psychology, based on research conducted over the last forty years, demonstrates that curvilinearity is not an issue when comparing physical abilities and job performance. According to Landy, the literature shows that the relationship between physical abilities and job performance is consistently linear and

is the same for men and women.

Landy's testimony on these points was not challenged by the Brunet plaintiffs. Their expert, Dr. Cranny, did not disagree with the results of Dr. Landy's trend analysis, nor did he challenge Landy's statement that the scatter diagrams, which Cranny had previously testified should be performed, turned out to provide meaningless information. Indeed, Cranny conceded that Dr. Landy had shown "that there is a linear relationship that would be sufficient to rank candidates." (Tr. 110).

The evidence described above fully addressed and effectively dispelled what the Court understood to be Dr. Cranny's concerns about linearity. However, at the May 21, 1992 hearing he shifted the focus of his concern about linearity to the representativeness of the incumbent group of firefighters used in the criterion-related validity study. There were proportionately fewer women in the incumbent sample used to measure job

performance than there were in the applicant population. Cranny theorized that there could be a problem with linearity if women had a sharply skewed distribution on the predictor measure i.e., the test, in relation to their distribution on the criterion measure, i.e., the job performance evaluation. As Landy pointed out, however, the only way the addition of women to the incumbent sample could introduce a curvilinear trend to the data would be if the relationship between abilities and performance for women was curvilinear, even though it was linear for men. Cranny says that in the absence of data to the contrary, he assumes that women perform as well on the job as men. Thus, although the distribution of the men's scores shows a symmetrical relationship between test results and job performance, he posits that the women's scores may be sharply skewed, and that this can result in nonlinearity.

Cranny's assumption about the performance of

women is deceptively appealing but flawed. He concedes that the job performance of male firefighters varies in relation to their physical abilities as measured by the test, i.e., that men who are better qualified physically perform better than those who are less qualified. If he were to assume that the job performance of women was as good as similarly qualified men, there would be no controversy and no possibility of a skewed distribution of scores. Included in his assumption about women, however, is his refusal to accept, without further evidence, the proposition that the performance of women varies in accordance with their physical abilities, as measured by the test, just as it does with men. Thus, Cranny is assuming not just that women perform as well on the job as men, but that women with lesser physical qualifications, as measured by the test, perform as well as men who are better qualified. Only then could womens' scores be skewed.

The Court rejects this reasoning and accepts Landy's testimony that there is no reason to believe or even suspect that the relationship between abilities and performance would be different for women than for men. The Court notes that in the hearing of December 19, 1991, Cranny testified, "The relationship between predictor and criterion is undoubtedly much the same for women as men." (Tr. Vol II p. 37). His concern then about the representativeness of the incumbent sample was its effect on correcting for restriction in range. When asked what effect it would have on linearity, he said "I don't know, and neither does anyone else." (Id. at p. 38).

The Brunet plaintiffs argue that Cranny's assumption about the performance of women on the job is supported by Chief Dutko's testimony. The testimony of Chief Dutko that he is satisfied with the performance of the women firefighters hired under the consent decree

is of no probative value on the issue of the relative performance of men and women who have attained various scores on the entry level test. The criterion study attempted to carefully measure differences in job performance in 17 different categories of duties and responsibilities in which the performance of each applicant was rated as high, average or low. These ratings were done by supervisors who had personally observed the subjects' performance on the job. The ratings were then correlated with the subjects' scores on the entry level test. There is no evidence that Chief Dutko evaluated any of the women hired under the consent decree in this manner; indeed, there is no evidence that he ever personally observed or evaluated the job performance of any of those women and compared it with the job performance of men or attempted to correlate job performance with test scores.

The Brunet plaintiffs argue that the small percentage

of women in the incumbent sample as compared to the applicant population violates §14B(4) of the Uniform Guidelines, which provides in part as follows:

> (4) Representativeness of the sample. Whether the study is predictive or concurrent, the sample subjects should insofar as feasible be representative of the candidates normally available in the relevant labor market for the job or group of jobs in question, and should insofar as feasible include the races, sexes, and ethnic groups normally available in the relevant job market.

The Brunet plaintiffs point out that in Dr. Landy's criterion-related study, women constituted 1.3% of the incumbent sample whereas women represented 10.11% of the applicant population. The Court notes, however, that in 1991, under the selection procedure established by the consent decree advocated by the Brunet plaintiffs, only 31 of the 519 applicants who were found to be qualified were women (5.9%). (Plaintiffs' Ex. 6, December 19, 1991 hearing.) Only qualified applicants can become incumbents, and when the

guidelines refer to candidates available in the relevant labor market, they mean qualified candidates. Be that as it may, considering the number of incumbent female firefighters available for testing at the time, the Court concludes that the incumbent sample was representative of the candidates available "insofar as feasible." Uniform Guidelines 14B(4).

The Court concludes that the difference in the proportion of women in the incumbent sample and the applicant sample has no legal or scientific significance in this case.

In the December 19, 1991 hearing, Dr. Cranny testified that a stepwise regression analysis of the various PCT events combined with the CAT revealed that the use of more than one event in combination with the CAT did not increase the validity of the examination. It was his opinion that since each event had an adverse impact on women, there was no justification for using

more than one PCT event. At the May 21, 1992 hearing, Dr. Cranny offered the opinion that the entire physical capability test could and should be discarded and that prospective firefighters should be selected on the basis of the cognitive ability test alone.

Stepwise regression is a technique of statistical analysis which can be applied to a series of tests to determine whether combining them increases their effectiveness in predicting performance. The researcher starts with one test and measures its effectiveness in predicting performance. The researcher then adds additional tests, measuring the effectiveness of each combination and comparing them to the first.

Dr. Landy criticized the use of stepwise regression as an analytical tool in this case because of the limitations of sample size, the "power" of the relationships, the probability of error and because the results could be manipulated in an arbitrary manner. Landy effectively

demonstrated the latter point by showing, that the same analytical technique used by Dr. Cranny to purportedly show that the PCT could be eliminated without decreasing the validity of the examination could be used to show that the CAT likewise could be discarded. The conclusion is dictated by the order in which the variables are inserted.

The entry level firefighter examination constructed by Dr. Landy was based upon a thorough and comprehensive job analysis which showed, not surprisingly, that the job requires two basic and equally important kinds of abilities: cognitive and physical. The job analysis identified seventeen specific aspects of job performance which were used as the criteria in the criterion-related study. Landy's content validity study demonstrated that each of the six PCT test events was significantly related to one or more aspects of job performance. The Court carefully examined each of the

test events in relation to the physical abilities necessary to perform the job of firefighter. See: Opinion and Order of May 21, 1987. One of the original test events was eliminated because the Court found that it was relatively unimportant to the job while having a significant adverse impact on female applicants.[1] The Court concluded that the remaining six events fairly tested the important physical abilities required for the job, including stamina, static strength, explosive strength and dynamic strength. Each event was carefully evaluated in relation to the test as a whole to ensure that all the physical abilities required were measured and that they were measured in proportion to their importance. This balance would be

---

[1] Landy's report on his criterion-related study suggests a reconsideration of the elimination of the hose hoist event but the City has not specifically requested reconsideration of this issue, thus the Court will not address it. The report also suggests that the fan hang event be scored in relation to the time needed to complete it instead of an a pass/fail basis but again the City has not requested permission to so modify the test.

destroyed by the elimination of one or more test events. The PCT as approved by the Court functions as a whole and the elimination of any of the test events would violate principles which the Brunet plaintiffs themselves advocated in the course of the proceedings on content validity.

In preparation for the May 21, 1992 hearing, Landy performed a stepwise regression analysis which showed that each of the PCT test events added some predictability to the whole and predicted different aspects of performance. However, he would not rely on this analysis to support the validity of the examination. The Court is persuaded by Landy's testimony that stepwise regression is not an appropriate analysis in this case.

Landy also performed a multiple regression analysis comparing the CAT and the PCT in relation to four job performance variables: 1) cognitive job performance; 2)

heavy physical performance; 3) transporting objects performance; and 4) overall performance. This analysis leads to the conclusion that the CAT was needed to predict cognitive performance, the PCT was needed to predict physical performance and that both were needed to predict overall job performance. The Court believes that this is true.

The conclusions which Dr. Cranny drew from his stepwise regression analysis were based on calculations of the increased predictability of the various PCT events in combination with the CAT, using the data labeled "overall performance" as the criteria. As Landy correctly pointed out, however, the data reported under the heading "overall performance" is simply a statistical aggregation of the seventeen job performance in the usual sense. This was only one of twenty statistical analyses done by Landy. It is not the criterion which establishes the validity of the PCT. Each of the

seventeen aspects of job performance are important variables. Landy has shown that each of the PCT test events is significantly related to one or more of these performance dimensions and that every performance dimension is significantly predicted by one or more of the PCT events.

Landy's calculations show, contrary to Cranny's concern, that the intercorrelations between the test events are not so high as to indicate that they are measuring the same thing. Indeed, Dr. Cranny himself expressed the belief that different individuals are being eliminated by different test events. This is confirmation of the independent contribution of each event.

While it may true, as Dr. Cranny contends, that reducing the number of PCT events would reduce the adverse impact on female applicants, it is not appropriate to lessen adverse impact by eliminating test events which are needed to predict performance on one

or more of the important abilities identified by the job analysis. The job of firefighter is extremely important to public safety. Landy's job analysis and content validity study identified exactly what physical abilities were necessary to perform the job. No one PCT event measures all of the physical abilities necessary for the job. For example, the stair climbing event is the only event which effectively measures stamina. Eliminating any of the six PCT events would result in the hiring. of firefighters who do not possess all of the physical abilities necessary to safely perform the job.

In deciding the issues raised in the hearings of December 19, 1991 and May 21, 1992, it was necessary for the Court to evaluate the conflicting testimony of two well qualified experts in the field of industrial psychology. The Court has found the testimony of Dr. Landy more convincing. Dr. Cranny is a highly respected academician, but he has never

prepared an examination for firefighters and he has little experience in the testing of public safety personnel. Landy, on the other hand, has had extensive practical experience in the specific area of concern to the Court. Dr. Landy specializes in the development, validation and administration of public safety personnel selection and promotion examinations. He has prepared over two dozen employment examinations for police and fire departments for cities all over the United States, including New York City, Philadelphia, Washington, D. C., Denver, Cleveland, Wilmington, Delaware and Grand Rapids, Michigan. He has had substantial experience in preparing entry level examinations for firefighters. In addition to Columbus, he has developed firefighter examinations for Cleveland, New York City and Washington, D. C. He has also been retained to develop firefighter examinations for Tulsa, Oklahoma and for the State of Massachusetts for statewide use. He has

studied the firefighter job firsthand, living in firehouses and accompanying firefighters inside burning structures. Landy is the author of a textbook on industrial psychology which is used in 220 colleges and universities.

In August of 1987, before Dr. Cranny was retained by the Brunet plaintiffs, he and Dr. Landy met at a professional convention. Landy asked Cranny to review his recently completed criterion-related study on the Columbus firefighter examination. After reviewing the report with Landy for about an hour, Cranny reported that he found it to be generally sound, that it contained no apparent errors and that the correlation coefficient of .44 was "healthy." Although Cranny now says that he did not evaluate the report from the standpoint of rank order hiring, he would have been well aware that this was the purpose for which it was prepared.

Since having been retained by the Brunet plaintiffs as

their expert witness in this case, Dr. Cranny has expressed several concerns about Landy's criterion-related study. When these concerns have been effectively addressed by Landy, he has raised new ones or shifted the emphasis of old ones. At the hearing of December 19, 1991, two of Dr. Cranny's major concerns were an alleged serious error in the correlation coefficients contained in Appendix K of Landy's report and the need for scatter diagrams to demonstrate the linearity of scores necessary for rank order hiring. The evidence showed that there was no error in Appendix K. Subsequently, a trend analysis supported linearity and scatter diagrams produced no meaningful information on that issue. Cranny then conceded that Landy's data showed a linear relationship sufficient to rank candidates but then said that the data was "not strictly the most appropriate data." (Tr. 110). This introduced his new emphasis on concerns about the

representatives of the incumbennt sample discussed herein. With regard to his stepwise regression analysis, Dr. Cranny first said it suggested that the CAT should be combined with one PCT event. Now he says that only the cognitive ability test should be used unless or until the City performs yet another study, not a stepwise regression analsysi but a multiple regression analysis demonstrating that one or more of the PCT events adds to the predictability of the CAT. Dr. Cranny now advocates the use of the cognitive ability test alone to select firefighters, even though he concedes that successful job performance requires certain physical abilities and even though he apparently accepts the fact that the PCT reliably measures those abilities. The Court rejects Dr. Cranny's hypothesis that the cognitive ability test alone is a reliable predictor of both the mental and physical abilities needed to perform the job of firefighter.

The construction of an employment examination which is fair to all candidates regardless of race, gender or national origin is not a simple task. This is particularly true where the job is complex, involves a combination of physical and mental abilities and is vitally important to public safety. No doubt there will always be aspects of any such examination about which qualified experts would disagree in good faith.

The City has shown by a preponderance of the evidence that the entry level firefighter examination constructed by Dr. Landy for the City of Columbus, as modified by the Court's order of May 21, 1987, is job related, that it fairly and effectively predicts performance an the job and that it is sufficiently precise to be used to select candidates in the order of their scores. The City has shown that a higher score on the examination is likely to result in better job performance. The Brunet plaintiffs have failed to show that there is an alternate

selection device which has less adverse impact on women and which is equally job related, fair and effective.

The Court's order of May 21, 1987 is hereby modified to permit the City to use the 1986 physical capacity test, as approved in that order, to hire firefighter candidates in rank order from one list, based on their combined scores on the physical capability test and the cognitive ability test giving equal weight to each.

It is so ORDERED.

JAMES L. GRAHAM
United States District Judge

DATE: July 24, 1992

FILED MARCH 18, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Ann Brunet, et al.,

Plaintiffs,

v.

Case No. C2-84-1973
(Consolidated with
Case No. C2-91-0616)

City of Columbus, et al., JUDGE GRAHAM

Defendants.

MEMORANDUM OPINION,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

These consolidated cases involve claims of gender discrimination asserted by male and female applicants for the position of firefighter in the City of Columbus Public Safety Department, Division of Fire. Case No. C2-84-1973 was commenced in 1984 by Ann Brunet and her co-plaintiffs, hereinafter referred to as the

"*Brunet* plaintiffs." The Brunet plaintiffs challenged the tests used by the City to select entry level firefighters in 1980 and 1984 on the grounds that they discriminated against female applicants. Case No. C2-91-616 was filed by Guy E. Tucker and his co-plaintiffs (hereinafter "*Tucker* plaintiffs") in July of 1991. The *Tucker* plaintiffs alleged that the consent decree which terminated the *Brunet* litigation in February of 1989 discriminates against male applicants.

At all relevant times, the Columbus Division of Fire entry level firefighters examination has consisted of two components, a cognitive mental ability test (CAT) and a physical capability test (PCT). In the *Brunet* litigation, the Court found that the plaintiffs failed to prove intentional discrimination against female applicants, but that they had shown that the PCT portion of the 1984 test had an adverse impact on female applicants and that the City had failed to show the job relatedness of

this component of the examination. *Brunet v. City of Columbus,* 642 F. Supp. 1214 (S.D. Ohio 1986) (Kinneary, J.), appeal dismissed, 826 F.2d 1062 (6th Cir. 1987), *cert. denied,* 485 U.S. 1034 (1988). The 1984 test was found not to be content valid for two reasons: (1) the test, taken as a whole, did not represent the physical demands of the firefighters position, and (2) there was insufficient evidence to justify rank order hiring. *Id.* at 1250.

The City was enjoined from hiring any new firefighters until a new PCT had been validated by the Court. The Court held that even after such validation, the City could use that test only on a pass/fail basis and that it could be used to rank order applicants only if the City could show, on the basis of subsequent studies, that it was, as a whole, sufficiently precise to be used for ranking. *Brunet,* 642 F. Supp. at 1252, 1253.

Before the decision in *Brunet,* the City had already

hired a consultant to develop a new PCT. The new test was completed and administered in early 1986. On May 21, 1987, after a three-day hearing, the Court found that, with the exception of one test event, the new PCT was content valid. The Court approved the use of the examination if modified to eliminate that event, approved the test for use on a pass/fail basis and required the City to hire male and female firefighters in proportion to their numbers in the candidate population which passed the test. *See Brunet,* Order of May 21, 1987. The City modified the new PCT to eliminate the offending test event and proceeded to hire firefighters in accordance with the Court's order.

In an order issued on June 12, 1987, the Court found that a total of four women should have been hired from the 1984 firefighter applicant class, and noting that the City had already hired three women from that class, it ordered the City to hire one more.

In order to support rank order hiring on the basis of the new PCT, the City commissioned a criterion-related validity study. This study was completed and filed with the Court on August 3, 1987. In the meantime, both sides appealed various aspects of the Court's prior rulings. While the appeal was pending, the City and the *Brunet* plaintiffs negotiated a settlement which included a consent decree containing *inter alia* the following provisions:

1. For purposes of hiring future firefighter applicants, the City and Civil Service Commission shall continue to use and administer the 1986 physical capability test events as modified by the Court on May 21, 1987, which order excludes the hose hoist event.

2. The City and Civil Service Commission shall continue to score the firefighter applicants test results on the physical capability test on a pass/fail basis, using the Court approved cut score of one standard deviation below the mean of incumbent firefighter "sum of Z's" scores on the test as a whole.

10. The City and Civil Service Commission report on criterion related validity currently pending

in this action is ordered withdrawn.

11. The City and Civil Service Commission shall continue to score the cognitive abilities test portion of the firefighters applicant examination on a pass/fail basis, and may continue to use the previously court approved cut score of the applicant mean.

12. The City and the Safety Director shall continue to appoint male and female applicants in proportion to the relative proportions of males and females achieving passing scores on the firefighter entry level test as a whole, for a period of at least 20 years from the date of this order. The number to be hired if a fraction shall be rounded up to the next whole number.

The order also provided compensation and other make whole relief for the *Brunet* plaintiffs.

The consent decree was submitted to the Court without any provisions for notice or hearing to any other individuals or class of individuals who might be affected by its terms. It was accepted and entered by the Court on February 27, 1989 without a hearing. Thereafter, the City has selected firefighter applicants from two lists,

one for men and one for women. On their respective lists, the men and women are ranked and selected in the order of their combined scores on the PCT and CAT with equal weight being given to each section of the examination. Women consistently score lower than men on the PCT. Thus, the consent decree operates to require the City to hire some women before or instead of some men who have higher combined scores.

In the *Tucker* case, plaintiffs seek declaratory and injunctive relief against the City, alleging that they have taken and passed the firefighter entry level examination and that their hiring or likelihood of hiring is eliminated or reduced by the *Brunet* consent decree which, they claim, prefers lesser qualified female applicants and thus discriminates against them on the basis of gender. The *Brunet* and *Tucker* cases were consolidated on August 13, 1991. On October 15, 1991, after having been granted the right to intervene, the *Tucker* plaintiffs

filed a motion in the *Brunet* case for relief from the consent decree pursuant to Fed. R. Civ. P. 60(b). Commencing on December 19, 1991, a hearing was held on the claims of the *Tucker* plaintiffs, and the matter is now before the court for decision on the merits.

Since they were not parties to the *Brunet* litigation, the *Tucker* plaintiffs are not bound by the consent decree of February 27, 1989. *Martin v. Wilks,* 490 U.S. 755 (1989). The *Tucker* plaintiffs had no notice of the proposed consent decree, nor were their interests adequately represented by the City which apparently decided to settle the case to avoid additional litigation expense. There is no evidence that the City gave any consideration to the impact of the consent decree on the rights of male firefighter applicants. There have been significant developments in the law since the signing of the consent decree, principally the decision of the

United States Supreme Court in *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). Even a party to a consent decree may seek to modify it if there has been a significant change in facts or law. *Rufo v. Inmates of Suffolk County Jail,* 112 S. Ct. 748, 60 U.S.L.W. 4100 (1992). For all of these reasons, the *Tucker* plaintiffs have standing to challenge the consent decree.

"[T]he voluntary nature of a consent decree is its most fundamental characteristic." *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland,* 478 U.S. 501, 521-22 (1986). "Consent judgments are, in effect, merely contracts acknowledged in open court and ordered to be recorded.... " *Long v. Saginaw,* 911 F.2d 1192, 1201 n. 5 (6th Cir. 1990). Thus, the validity of relief provided in a consent decree is to be assessed for consistency with the Fourteenth Amendment no differently than a voluntary affirmative action plan. *In re Birmingham Reverse Discrimination Employment Litigation,* 833 F.2d

1492, 1501 n. 23 (11th Cir. 1987), *aff'd on other grounds, Martin v. Wilks, supra; Howard v. McLucas,* 871 F.2d 1000, 1006 (11th Cir. 1989), *cert. denied, Poss v. Howard,* 493 U.S. 1002 (1989).

In *Croson,* 488 U.S. at 507, the Supreme Court held that race based set aside programs undertaken by municipalities are subject to strict scrutiny and that to satisfy the Equal Protection Clause, they must be "narrowly tailored to remedy prior discrimination." Gender based preferences are likewise subject to strict scrutiny under the Equal Protection Clause.

> In order for a race or sex based remedial measure to withstand scrutiny under the fourteenth amendment there must first be some showing of prior discrimination by the governmental entity involved, and second, the remedy adopted by the state must be tailored narrowly to achieve the goal of righting the prior discrimination.

Conlin v. Blanchard, 890 F.2d, 816 (6th Cir. 1989). *See also, Long v. Saginaw, supra.* The February 27, 1989 consent decree fails to pass muster under this

standard.

In *Brunet,* 642 F. Supp. at 1223, the Court found that the plaintiffs failed to prove intentional discrimination against women applicants for the position of firefighter:

> Plaintiffs' evidence of intent to discriminate is at best impressionistic. Further, there is substantial evidence suggesting the absence of discrimination. Accordingly, judgment must be rendered for the defendants on plaintiffs' claim of intentional discrimination under §1983.

The Court further found that the plaintiffs had failed to show that the 1980 testing and selection process had an adverse impact upon female applicants. *Id.* The only finding of discrimination against women was the finding that the PCT portion of the 1984 entrance examination had an adverse impact against women and that the City had failed to show that it was job related. In a later decision, the trial judge in *Brunet* characterized this finding of discrimination as "singular." Temporary Restraining Order, 7/30/91 at page 6.

Although the *Brunet* plaintiffs argue that the consent decree is supported by past and present disparity of women in the position of firefighter, neither the City nor the *Brunet* plaintiffs attempted to prove past discrimination with evidence of disparity in the present proceedings. The Court in the original *Brunet* case apparently did not accept plaintiffs, claims in that regard. In any event, mere statistical imbalance alone would not suffice. *Croson,* 488 U.S. at 501; *Hazelwood School District v. United States,* 433 U.S. 299 (1977). There was no evidence introduced here or in the original *Brunet* case which would justify a finding of a pattern or practice of discrimination against women. There was no evidence that the City itself had made any determination of past discrimination as the predicate for an affirmative action program for the hiring of female firefighters. Based on the record in Brunet and the record here, the appropriate relief was an order providing make whole

relief for the women who were adversely affected by the 1984 examination and an order enjoining the City from utilizing the offending testing procedures in the future.

The Court in its interim orders in *Brunet* required the City to adopt a system for selection of male and female firefighters who passed the 1986 exam "so that the percentages of females and males considered for hire reflects the relative proportions of male and female applicants achieving passing scores." *Brunet,* 642 F. Supp at 1253. Such a formula was necessary until a final nondiscriminatory set of selection procedures was approved by the Court, but the Court stressed that in the final analysis the number of women firefighters to be hired should be decided on the basis of a validated examination. The Court stated, *Id.* at 1228:

> Title VII does not require employers to equalize the probabilities of hiring of the average members of two groups. Rather, it requires that actual individuals enjoy opportunities for employment free from discriminatory barriers.

The Court went on to note, *Id.* at 1250:

> It is not the province of the Court to determine whether women should be firefighters, or how many women should be firefighters. Rather, it is the Court's duty to evaluate a test in light of the standards set forth in Title VII. How many women should be firefighters can be decided only by the administration of a validated examination.

Paragraph 12 of the consent decree creates a gender based quota for firefighter applicants which must remain in effect for at least twenty years. The consent decree utilizes a floating percentage tied to the "relative proportions of males and females achieving passing scores on the firefighter entry level test as a whole." In the absence of the consent decree, applicants of both genders would be permitted to compete for all positions, but under the decree they are each limited to a lesser percentage of the available jobs. The distinction is based solely upon the gender of the applicant. But for their gender, male applicants would be entitled to compete for all available firefighter positions. By

agreeing to this order, the City has intentionally discriminated against male applicants. The consent decree violates the Equal Protection rights of male applicants for the entry level position of firefighter because it is not narrowly tailored to remedy the prior discrimination found in *Brunet.* After the decision in *Croson,* the invalidity of the decree should have been obvious to the City.

The consent decree purports to treat all applicants who pass the combined PCT and CAT as equally qualified. In fact, however, the City does not consider them equally qualified. It uses the results of the combined tests to rank order candidates within their gender groups. Two hiring lists are maintained, one for men and one for women. Women who score higher are regarded as better qualified than women who score lower and they are hired accordingly. The same is true of men. To date, women as a group have scored lower

than men. Thus, the decree has operated to require the City to hire women who score lower than men.

Members of both sexes should have an equal opportunity to compete for all the available positions. If all passing applicants are equally qualified then they should be selected on a gender neutral basis. A lottery would be one example of a gender neutral selection device. No doubt there are other selection devices which would give applicants of both sexes the opportunity to compete for all available positions. if all passing applicants are not equally qualified, then the best qualified should be hired regardless of gender.

Assuming hypothetically that in the absence of the consent decree the City would have rank ordered all applicants on one list, then the decree has, to date, operated to the detriment of male applicants. However, it does not necessarily follow that this would always hold true. As more women engage in physical training

programs which increase their physical strength and cardiac reserve, it is entirely possible that the floating quota of the consent decree could result in the hiring of men who score lower than women. Although the present challengers are male, in a real sense the consent decree discriminates against both men and women by making sex a determining factor in the hiring decision. The Constitution requires that applicants of both sexes have an equal opportunity to compete for all positions.

The Court retains continuing jurisdiction to modify or enjoin the enforcement of a consent decree. *Stotts v. Memphis Fire Department,* 679 F.2d 541 (6th Cir. 1982), *rev'd on other grounds,* 467 U.S. 561 (1984). Modification of the instant consent decree is appropriate because the *Tucker* plaintiffs have established that its provisions unlawfully infringe their rights under the Fourteenth Amendment.

Most of the evidence presented at the hearing of December 19, 1991 related to the issue of whether the new PCT could be appropriately used to rank order all candidates, male and female, on one selection list. The Court does not rest its finding of discrimination on the City's failure to use the test in this fashion. The Court recognizes, however, that the City may wish to consider so using it as one of the options available to it in implementing a non-gender based selection procedure in light of this Court's decision finding the consent decree invalid.

The Court is not prepared at this time to make a finding on the validity of the PCT as a basis for rank ordering. As noted *infra,* additional expert testimony may be helpful once the City decides what kind of selection procedure it will use in the absence of the consent decree. While the Court is not prepared to make a final decision on the validity of the PCT for rank

order scoring, it is prepared to make findings an some of the issues relevant thereto.

"Ranking is a valid, job-related selection technique only where the test scores vary directly with job performance." *Williams v. Vukovich,* 720 F.2d 909, 924 (6th Cir. 1983), *citing Guardian's Ass'n of New York v. Civil Service Commission,* 630 F.2d 79, 100 (2nd Cir. 1980), *cert. denied,* 452 U.S. 940 (1981).

The Equal Employment Opportunity Commission's *Uniform Guidelines on Employee Selection Procedures ("Uniform Guidelines")* provide:

> If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels. Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

29 C.F.R. §§1607.14(C)(9).

The development and evaluation of personnel selection devices falls within the field of industrial psychology. When called upon to construct or evaluate an employment test, experts in this field generally rely on their education and experience, the professional literature and recognized standards or principles of employment testing. In the latter category, there are three principal sources: the *Uniform Guidelines, Principles for the Validation and Use of Personnel Selection Procedures* published by the Society for Industrial and organizational Psychology *("SIOP Principles")*, and *Standards for Educational and Psychological Testing* published by the American Psychological Association (*"APA Standards")*.

There are three accepted strategies for validating an employment test: content validity, criterion-related validity, and construct validity. Evidence of criterion-related validity typically consists of a demonstration of

a correlation between the test and success on the job, and the measure of job performance is referred to as the "criterion." There are two kinds of criterion-related strategies: predictive and concurrent. In a predictive criterion-related analysis, the results of the test are related to the subsequent job performance of a group of individuals who have been hired after having taken the test. Such a study often requires a number of years to complete, since the individuals to be measured by the job performance criteria must have time to gain experience and demonstrate their performance on the job and there must be a sufficient number of them to provide meaningful statistics. In a concurrent criterion-related analysis, the employment test is given to incumbents who have already obtained the necessary on the job experience and have an established record of performance. In content validation, a job analysis is conducted to identify the tasks, behaviors or knowledge

which are important in performing the job, and the test is designed to be a representative sample of those tasks, behaviors or knowledge. Construct validation involves testing for certain psychological characteristics or "constructs" thought to be important or essential to the job.

In response to the *Brunet* plaintiffs' challenge to the 1984 firefighter examination, the City retained Frank J. Landy, Ph.D. and his consulting firm Landy, Jacobs & Associates, Inc. to develop and validate a new PCT. In formulating the new PCT, Dr. Landy relied on the content validity strategy. After a hearing, the Court found that the new PCT was valid after eliminating one test event.

In *Brunet,* 642 F. Supp. at 1250, the Court said:

> If defendants wish to continue to rank order candidates, they must be prepared to show that rank ordering complies with the Uniform Guidelines. Specifically, they must produce evidence to show that a higher score on the examination is likely to

result in better job performance.

In a supplemental opinion and order, the Court noted that the City had been discussing concurrent and predictive criterion-related validity studies with Dr. Landy in order to address the Court's concern regarding the use of test scores to rank order applicants. *Brunet,* 642 F. Supp. at 1252. The Court noted that a "predictive criterion-related validity study provides the best and most direct evidence of job relatedness" and went on to hold, *Id.* at 1253:

> When hiring from the 1986 list occurs, defendants will then perform their proposed predictive criterion-related validity study. If defendants can show, on the basis of the predictive and concurrent criterion-related studies they propose that the test as a whole is sufficiently precise to be used for ranking, they may then apply to the Court for an Order permitting ranking.

A concurrent criterion-related study was completed and filed with the Court in early August 1987. Funds were set aside for a predictive criterion-related study

and some preliminary work was done, but this project was terminated when the City entered into the consent decree.

Nothing in the professional standards or in the *Uniform Guidelines* requires both a concurrent and a predictive criterion-related validity study in order to justify rank order scoring. Indeed, there is no requirement that any criterion-related validity study be performed in order to justify rank order scoring. Rank order scoring can be justified on the basis of a content validity study. The City's expert, Dr. Landy, testified that in his opinion, the content validity analysis of the 1986 CAT demonstrated sufficient reliability to justify rank order scoring without the necessity of further studies.

The Court's statement in *Brunet* that the City must show that rank ordering complies with the Guidelines, specifically that it must show that a higher score on the examination is likely to result in better job performance,

was a correct statement of defendants' burden. The more stringent requirements set forth in the Court's supplemental opinion and order appear to have been induced by the City's representation that it then intended to conduct both concurrent and predictive criterion-related validity studies to justify rank order scoring. In any event, the Court's pronouncements in its supplemental opinion and order were not intended to be its last word on the subject. The *Brunet* Court retained jurisdiction over the City's testing procedures and clearly contemplated that a hearing would be held on the issue of rank order scoring if the City chose to pursue rank order scoring of the new PCT. This Court does not view the statements contained in the supplemental opinion and order as restricting it to evidence of predictive criterion-related validity in determining whether rank order scoring is appropriate. Circumstances have changed since the *Brunet* Court made those comments.

The City did not proceed with the predictive criterion-related validity study. Instead it entered into a voluntary consent decree and withdrew the report of Dr. Landy's concurrent criterion-related validity study before the Court had the opportunity to consider it.

With regard to the August 1987 concurrent criterion-related validity study, Dr. Landy described his methodology as follows: He identified a representative sample of incumbent firefighters who were given the new PCT. He then proceeded to gather performance ratings from the supervisors of these incumbent firefighters on eighteen different firefighting performance areas. Landy then calculated the correlation coefficients or measures of association between test scores and performance ratings. A correlation coefficient is a statistical index of association between two variables. In order to be significant, it must be demonstrated that a validity coefficient is significant at or beyond the .05

level of significance, which means it would be expected to occur no more than five times out of a hundred by chance alone. The *Uniform Guidelines* require a value of .05. Landy's analysis showed that each of the seven PCT test events (with the exception of the coupling event which had no adverse impact on women) was significantly correlated with one or more performance dimensions of the firefighter job. The level of significance of the correlation coefficient for each event exceeded .05 and many far exceeded that standard. Landy demonstrated that there is a high correlation between an applicant's score on the PCT and performance on the job.

The *Brunet* plaintiffs' expert, Dr. Charles J. Cranny, believed that there was a significant error in Appendix K of Dr. Landy's report which cast doubt on the reliability of his correlation coefficients. Dr. Cranny came to this conclusion largely because Appendix K

reported that the validity coefficient of the final composite of the PCT and the written exam was less than the total of the two components. A multiple correlation coefficient cannot be less than the highest correlation of any one of the independent variables included within it. As Dr. Landy explained, however, the values reported in Appendix K are corrected values and each was corrected in a different way. As such they can no longer be used together for other statistical manipulations. Landy pointed out that the uncorrected values for the overall PCT and written examination when added together do result in a higher composite validity coefficient just as Cranny said they should. Further, as Landy pointed out, the final composite validity coefficient reported in Appendix K is not a multiple correlation coefficient but a zero order coefficient, and as such there is no anomaly in the fact that the sum is less than one of the parts.

The Court finds, on the basis of Dr. Landy's concurrent criterion-related validity study that there is a high correlation between an applicant's score on the PCT and performance on the job.

Dr. Cranny testified that for rank order scoring, there must be a linear relationship between test results and job performance across the range of scores used to rank the candidates. Cranny believes that there is a lack of evidence of such linearity and that additional studies, such as the construction of scatter diagrams, are necessary to demonstrate it. Landy testified that the presence of a linear relationship is implicit in the high correlation coefficients between the test events and performance measures.

Dr. Cranny testified that a step-wise regression analysis of the various PCT events combined with the CAT revealed that while each of the PCT events alone added validity to the overall examination, two or more in

combination did not increase its validity. It was Cranny's opinion therefore that since each event had an adverse impact on women, there was no justification for using more than one of the PCT events. Cranny feels that the test events may all be measuring the same underlying characteristics. According to Cranny, continuing to consider events that operate to the disadvantage of women but do not serve the legitimate purpose of identifying qualified firefighters is clearly discriminatory. Landy rejected Cranny's multiple regression analysis on the grounds that his job analysis demonstrated that all of the PCT events were important parts of the job and that the PCT and the CAT should each be given equal weight.

Cranny's first reference to scatter diagrams and multiple regression analysis was in his testimony at the December 19th hearing. While Landy had the opportunity to respond briefly in a subsequent

telephonic deposition, the Court does not feel that the present record on these issues is adequate. In the event the City decides to use the PCT for rank order scoring, the Court will hear additional evidence on these two issues.

The Court notes that both experts agree that the CAT is sufficiently reliable for rank order scoring and that it has no adverse impact against women. The provisions of the consent decree which required the City to use this component of the test only on a pass/fail basis is not justified.

Based on the foregoing analysis, the consent decree of February 27, 1989 is hereby set aside and the City is enjoined from selecting firefighters in the manner provided therein.

The City must design a nondiscriminatory selection procedure for entry level firefighters. There are no doubt a number of options from which the City may

choose.

The Court will hold a status conference in the near future to discuss the remaining issues in this case, including the procedure to be utilized in determining what damages or remedies the *Tucker* plaintiffs may be entitled to other than injunctive relief. Any remedies ordered by this Court may well depend upon any new system of hiring which the City would propose to use in the absence of the consent decree.

It is so ORDERED.

JAMES L. GRAHAM
United States District Judge

DATE: March 18, 1992

FILED FEBRUARY 27, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANN BRUNET, et al., :

Plaintiffs, :

vs. : Case No. C2-84-1973

CITY OF COLUMBUS, et al., :

Defendants. :

ORDER

This matter came on for hearing before the Court upon advice by the parties that both plaintiffs and defendants appeals pending in the Sixth Circuit Court of Appeals have been dismissed.

The Courts enters this final order which summarizes and disposes of all issues except the amount of attorney fees and costs.

The following orders are made:

1. For purposes of hiring future firefighter applicants, the City and Civil Service Commission shall continue to use and administer the 1986 physical capability test events as modified by the Court on May 21, 1987, which order excludes the hose hoist event.

2. The City and Civil Service Commission shall continue to score the firefighter applicants test results on the physical capability test on a pass/fail basis, using the Court approved cut score of one standard deviation below the mean of incumbent firefighter "sum of Z's" scores on the test as a whole.

3. The City and Civil Service Commission shall continue to use the physical capability training program devised by them for firefighter applicants pursuant to a previous order of the Court. The program is set forth in the booklet devised and distributed by the Civil Service Commission entitled "The Firefighter Physical Capability Test (PCT) and Cardiovascular Stress Test Preparation Program." The City and Civil Service Commission will provide notice of this program and a copy of this booklet to all female firefighter applicants and encourage participation in this program. This notice will be provided when the City and Civil Service Commission advise applicants of the date of the written portion of the examination.

4. The City and Department of Public Safety shall actively recruit females for the position of

firefighter which recruitment shall include written notices of posting to the following: N.O.W., Y.W.C.A., O.S.U. Women's Studies and Women's Services, Columbus public high school vocational counsellors, Columbus area colleges (Columbus State Community College, Ohio Dominican College, Ohio Wesleyan, Franklin University, Capital University), Job Training Program Ohio, O.B.E.S. (Franklin County offices, and State Women's Program), N.A.A.C.P., Columbus Urban League, Committee Against Sexual Harassment, and such other groups and organizations as are reasonably calculated to reach interested females.

5. The defendants' counsel shall notify plaintiffs' counsel prior to the hiring of new firefighter applicants, of the numbers of female and male applicants who completed all portions of the entry level examination, the numbers of each who passed all portions of the entry level examination, and the numbers of males and females the defendants propose to hire.

6. The City shall pay the sum of $1,500 each to Lynn Shearrow, Rebecca Shumacher and Edwina Hornung for release of all their claims.

7. In settlement of all her claims, the City shall pay to or for the benefits of Ann Brunet as follows:

   a. the City shall pay to her the sum of $25,000.00 as back pay;

   b. the City shall deposit in her pension fund account the sum of $8,000.00;

c. The City shall increase her sick leave bank by 410.31 additional hours;

d. the City shall increase her vacation leave bank by 410.31 additional hours; and

e. the City shall increase her hourly rate to $12.68 per hour.

In addition, the City shall change Ann Brunet's seniority date from July 13, 1987 to February 4, 1985 for all purposes except eligibility for promotion. For purposes of eligibility of promotion, her seniority date shall remain July 13, 1987.

8. The amounts to be paid under paragraphs 6 and 7 of this Order are due to be paid by the City within 30 days, and if not so paid, interest at the annual rate of 10% shall begin to accrue.

9. The plaintiffs' motion for contempt is ordered withdrawn.

10. The City and Civil Service Commission report on criterion related validity currently pending in this action is ordered withdrawn.

11. The City and Civil Service Commission shall continue to score the cognitive abilities test portion of the firefighters applicant examinations on a pass/fail basis, and may continue to use the previously court approved cut score of the applicant mean.

12. The City and Safety Director shall continue to appoint male and female applicants in proportion to the relative proportions of males and females achieving passing scores on the firefighter entry level test as a whole, for a period of at least 20 years from the date of this Order. The number to be hired if a fraction shall be rounded up to the next whole number.

Joseph P. Kinneary
United States District Judge

Supreme Court, U.S.
FILED
FEB 2 1994
CLERK

No. 93-1101

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ANN BRUNET and DENISE SACHS,
on behalf of themselves and the class they represent,
Petitioners,

v.

GUY E. TUCKER, JAMES T. MEYER,
STUART J. TUDOR, and JOSEPH S. HILLEARY,
on behalf of themselves and the class they represent,

and

CITY OF COLUMBUS, OHIO, COLUMBUS
CIVIL SERVICE COMMISSION, DANA RINEHART,
ALPHONSE MONTGOMERY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION OF GUY E. TUCKER, et al.

RICHARD A. FRYE
Counsel of Record
MARION H. LITTLE
JANINE M. DASCENZO
SCHWARTZ, KELM, WARREN
& RUBENSTEIN
41 South High Street, 23rd Floor
Columbus, Ohio 43215
(614) 222-3025

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	1
ARGUMENT	2
CONCLUSION	13

TABLE OF AUTHORITIES

Cases:	Page
Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993)	1,2,3,4,6,8,9,10,11,12
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)	4
Contractors Ass'n of Eastern Penn., Inc. v. Philadelphia, 735 F. Supp. 1274 (E.D. Pa. 1990), *vacated on other grounds*, 945 F.2d 1260 (3d Cir. 1991)	5
Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991)	5
Craig v. Boren, 429 U.S. 190 (1976)	5
Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980)	11,12
Dozier v. Chupka, 395 F. Supp. 836 (S.D. Ohio 1975), *injunction dissolved*, 763 F. Supp. 1430 (S.D. Ohio 1991)	4
E.E.O.C. v. Jordan Graphics, Inc., 769 F. Supp. 1357 (W.D.N.C. 1991)	7
Franks v. Bowman Transp. Co., 424 U.S. 767 (1976)	12
Martin v. Wilks, 490 U.S. 755 (1989)	11
Michigan Road Builders Ass'n v. Milliken, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989)	5
Northeastern Florida Contractors v. Jacksonville, ___ U.S. ___, 113 S. Ct. 2297 (1993)	11
Patterson v. Newspaper & Mail Deliverers' Union, ___ F.3d ___, 1993 U.S. App. LEXIS 33407 (2d Cir. Dec. 20, 1993)	8
Rufo v. Inmates of Suffolk Co. Jail, ___ U.S. ___, 112 S. Ct. 748 (1992)	3,8,13
Shelley v. Kraemer, 334 U.S. 1 (1948)	7
Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993)	5

STATEMENT OF FACTS

Disregarding the facts as found in both lower courts, Petitioners assign a discriminatory motive and effect to virtually every decision on hiring within the Columbus Division of Fire over the last twenty years. The purported evidence of discrimination lacks support in the Record; indeed most such assertions were squarely rejected by the District Court. Petitioners' Statement of Facts omits key dispositive facts expressly relied upon by the lower courts.

- There is no direct evidence of any intentional discrimination against female applicants since Title VII was made applicable to municipalities. (1 F.3d at 406, 409; App. 63-64, 77.)
- No evidence of current discrimination exists. (1 F.3d at 409; App. 77-78.)
- The District Court held in 1986, after a trial on the merits, that Petitioners had failed to establish intentional discrimination. (1 F.3d at 405; App. 61.)
- The District Court held in 1992, after a trial on the merits, that there was no evidence of a pattern or practice of discrimination against women. (1 F.3d at 406; App. 66.)
- The singular past discrimination resulting from the disparate impact of testing procedures in 1984 affected a total of four female applicants, and it was fully remedied. A new test was validated, and the few affected applicants appointed to posi-

tions with the Fire Division. (1 F.3d at 395, 409; App. 16, 79-80.)

- The City of Columbus disregarded its own expert's new test in agreeing to the consent decree, and in using it as an excuse to intentionally hire less-qualified applicants solely because they were women. (1 F.3d at 407, 409-11; App. 68, 78-86.)
- Any gender discrimination in hiring which occurred prior to the effective date of Title VII, eighteen years ago, was too remote to support the consent decree, especially in light of aggressive affirmative efforts by the City to recruit female firefighter applicants starting in the mid-1970's. (1 F.3d at 405, 409; App. 61, 76.)
- The statistical disparity, if any, between qualified females and existing female firefighters was the consequence of job-related methods of selecting the most qualified applicants. (1 F.3d at 407; App. 69-70.)
- In order to remedy harm sustained by the male Respondents, very modest remedial relief was granted adjusting the relative seniority among Respondents and Petitioners. (1 F.3d at 413; App. 93-94.)

ARGUMENT

This case involves little more that the application to a unique set of facts of the precedents which have evolved in this Court's jurisprudence examining classifications challenged under the Equal Protection

Clause, and the authority of federal courts to modify injunctive orders entered in earlier litigation. Although left unaddressed in Petitioners' Questions Presented, the alternative ground for the decision below is derived from this Court's recent opinion in *Rufo v. Inmates of Suffolk Co. Jail*, ___ U.S. ___, 112 S. Ct. 748 (1992). Five[1] different federal judges have found that the gender-based preference implemented in February, 1989 as one part of a consent decree, which ignored the City's new civil service examination in favor of a quota with a minimum duration of 20 years, was wholly unjustified as a remedy for past discrimination. The decree was properly modified upon the challenge filed by these Respondents, Guy E. Tucker, et al.

---

[1] Senior District Judge Joseph P. Kinneary heard both the original *Brunet* case and the earlier *Dozier* case referenced in the Petition, which involved racial discrimination issues. In February, 1989, at the request of Petitioners and the City, the Court entered the consent decree in *Brunet I* containing the challenged gender-based hiring arrangement. App. 159. By July 1991, however, Judge Kinneary agreed at least preliminarily that his 1989 Order was probably constitutionally infirm. Thus, the Court entered several well considered Orders, after notice, early in the *Tucker* suit putting a halt to further use of the *Brunet I* quota for the next fire class scheduled to begin in mid-August, 1991. After Judge Kinneary's Orders were "stayed" by a single Circuit Judge, however, counsel for the Brunet plaintiffs filed a Motion to Disqualify Judge Kinneary. While denying the Motion in a lengthy Opinion filed August 22, 1991 which reviewed at length the proceedings before him, Judge Kinneary held the Motion to Disqualify filed by Petitioners violated Rule 11, FRCP. That Order was not included in Petitioners' Appendix. Judge Kinneary nevertheless recused himself to avoid any possible criticism of the Court, resulting in reassignment to District Judge James L. Graham who conducted further proceedings. 1 F.3d at 398; App. 31, note 6.

As framed, the Questions Presented are inexplicably bound up in the details of the vast factual Record. Evidence was accumulated through two different *Brunet* lawsuits and, indirectly, through other discrimination litigation involving the Fire Division dating back into the 1970's. *See Dozier v. Chupka,* 395 F. Supp. 836 (S.D. Ohio 1975), *injunction dissolved,* 763 F. Supp. 1430 (S.D. Ohio 1991). The fact-specific nature of the inquiry in this case is evidenced by lengthy decisions of both the trial judges and of the Court of Appeals. No novel issue of constitutional law is presented. Further review in this Court is not appropriate for the gender-based preference at issue in this litigation premised upon nothing more than ill-conceived paternalistic stereotyping.

I.

Petitioners first contend that this case deserves review because the United States Court of Appeals for the Sixth Circuit applied "strict scrutiny" analysis in this case, and in previous gender discrimination cases under the Fourteenth Amendment, while the Ninth Circuit does not. This is not a question upon which this Court should grant the Writ.

Undeniably the Sixth Circuit references the "strict scrutiny" doctrine in its decision. It is equally clear that it also reviewed all of the applicable precedents from this Court which expressly recognized that "searching judicial inquiry" and "close examination of legislative purpose" are appropriate when reviewing "classifications based either on race or gender." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-95 (1989). Given the factual Record in this case, the same outcome would have been reached using any

formulation of "strict," "searching," "close," "heightened," or "intermediate" scrutiny.[2] Under any such scrutiny the question presented, first and foremost, is whether there existed identifiable, actionable discrimination sufficient to justify an otherwise impermissible classification. *See Coral Construction Co. v. King County*, 941 F.2d 910, 931-32 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 875 (1992); *Contractors Ass'n of Eastern Penn., Inc. v. Philadelphia*, 735 F. Supp. 1274, 1304 (E.D. Pa. 1990), *vacated on other grounds*, 945 F.2d 1260 (3d Cir. 1991), *subsequent opinion*, 6 F.3d 1990 (3d Cir. 1993). The Sixth Circuit's pre-*Croson* decision in *Michigan Road Builders Ass'n v. Milliken*, 834 F.2d 583, 595 (6th Cir. 1987), embraced this premise as well. There the Court found a female preference unconstitutional because the government had nothing to justify it except generalized assertions of past discrimination. In light of the *Croson* decision and other applicable precedents from this Court, one may not justify a gender-based preference using group stereotyping. Any preference must be premised upon continuing or past discrimination left unremedied. This principle is supported not only by the Sixth Circuit's decision here and in *Michigan Road Builders*, but also in the Ninth Circuit's *Coral* decision, which is relied upon by Petitioners. There is, thus, no Circuit split on this fundamental point.

---

[2] Indeed, a good faith argument from this Record can be made that the consent decree fails the less demanding "rational basis" analysis. It defied rationality to jettison Dr. Landy's thoughtfully developed test and his other work under the circumstances which existed in February, 1989, and go instead to a 20-year quota. *See Craig v. Boren*, 429 U.S. 190, 215 (1976) (Stewart, J., concurring); *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993).

Petitioners utterly failed to make even a minimal factual showing of the genuine need for continued gender-specific "remedial" action in this instance. They offered no factual showing when the consent decree was originally adopted in 1989. They made no such showing after these Respondents brought suit in 1991. The District Court's factual findings foreclose Petitioners on that point, particularly when the Court of Appeals in this case went so far as to reexamine factual findings derived from the Record in *Brunet I* (which had been previously closed by Petitioners' voluntary dismissal of their first appeal).

After an examination of the old *Brunet I* Record, the Court of Appeals rejected Petitioners' arguments that those District Court findings could be overturned and thereby justify this quota. Thus the Court of Appeals affirmed the trial court's factual finding "that the City did not intentionally discriminate against women in the hiring of firefighters." 1 F.3d. at 405-06; App. 63-64; *see also* 642 F. Supp. at 1236. The District Court further found that there was "no evidence . . . which would justify a finding of a pattern or practice of discrimination against women." 1 F.3d at 406; App. 66. The Court of Appeals correctly recognized that in reaching such conclusions the District Court in *Brunet II* had not simply relied upon the earlier *Brunet I* decision. 1 F.3d at 406; App. 66. In short, Petitioners defend a consent decree never genuinely needed or intended to remedy discrimination.

Because there is no Circuit split on the controlling legal proposition that there must be meaningful evidence of past discrimination to justify any "remedy" like the 20-year quota set up in the 1989 consent decree, Petitioners failed. Rather than serving as a

remedy, the consent decree, as found by both the District Court and the Court of Appeals, actually constituted "intentional discrimination" against male firefighter applicants. The City had the obligation of protecting the rights of each *individual* applicant, male or female, consistent with the obligation imposed by the Fourteenth Amendment since at least *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). The City of Columbus disregarded individual test scores when it consented to the decree in early 1989, which disregarded the City's own brand-new civil service test. The test had been carefully constructed by Dr. Landy, a nationally known expert in industrial psychology. App. 115, 120-22, 146. Instead of using its test to protect all individuals, male and female, the District Court found the City "apparently decided to settle the [*Brunet I*] case to avoid additional litigation expense." App. 134. Simultaneously Dr. Landy's detailed Report on the validity of the new PCT was quietly "withdrawn," without any explanation, from the consideration of the District Court. It had been in the *Brunet I* file awaiting the Court's review, and presumably approval, between August 3, 1987 and February 27, 1989. App. 131, 162, consent decree para. 10.

The statistics-based arguments advanced by Petitioners[3] were carefully reviewed in the Court of Appeals. It affirmed the trial judge's conclusion that

---

[3] In considering them, the observation of one federal trial judge seems apt:

> It has been said, statistics are like a lamp post to a drunk—they provide support but furnish very little illumination.

E.E.O.C. v. Jordan Graphics, Inc., 769 F. Supp. 1357, 1383 (W.D.N.C. 1991).

disparities alone in hiring between men and women for the difficult job of firefighter simply were not of much value. "[T]he same reason for the small percentage of women on the fire force today explains why there were so few women on the force in 1986—the PCT has [a permissible] adverse impact on women." 1 F.3d at 407; App. 70. Other evidence was also reviewed by the District Court and the Court of Appeals to determine if there was "a 'strong basis in evidence' to support the consent decree at issue." 1 F.3d at 408; App. 75. There was not. Failure to make this threshold showing was dispositive, and was unrelated to the precise label assigned to the level of Equal Protection scrutiny.

This does not end the inquiry. Under this Court's recent decision in *Rufo v. Inmates of Suffolk County Jail*, ___ U.S. ___, 112 S. Ct. 748 (1992), a District Court retains significant discretion to reexamine injunctive orders. The trial court recognized and exercised that authority. App. 126, 134-135, 143. This Court's precedents on the more flexible standard of modification of consent decrees or injunctions in public or institutional reform cases were appropriately applied, in the discretion of the District Court, given the factual Record in this case. *See also Patterson v. Newspaper & Mail Deliverers' Union*, ___ F.3d ___, 1993 U.S. App. LEXIS 33407 (2d Cir. Dec. 20, 1993). Although this is an essential element of this litigation, Petitioners fail to address the exercise of the District Court's discretion under *Rufo* in any of the Questions Presented.

II.

The second Question Presented by Petitioners is that the factual Record was sufficient to support a

"gender conscious consent decree." With few citations to the Opinions of either the District Court or the Court of Appeals, Petitioners simply seek to rewrite the facts as found below.

Little discussion is justified on this Question other than, perhaps, to address one key factual conclusion underlying Petitioners' argument. They argue that at the date of the consent decree in February, 1989, "ranking on the firefighter test was discriminatory." Petition at 23; and at 15, note 7. This is a misleading use of the factual Record, attempted in the lower courts but wisely rejected. No one, except counsel for the Petitioners, has ever said that "in February, 1989, when the consent decree was filed, ranking on the firefighter test discriminated against women." Petition at 15, note 7. The true situation was that in February, 1989, the District Court *had not yet judicially approved* use of the City's *new* firefighter test *for rank order hiring* based on individual test scores. However the lack of judicial approval—which was given by Judge Graham in 1992 based largely upon evidence available in 1987—is not equivalent to "discrimination."

In February, 1989, the professional study of the entry-level test needed to gain judicial approval was sitting in the District Court's file, having been filed in *Brunet I* as soon as it was completed by Dr. Landy in August, 1987. 1 F.3d at 395; App. 17. As the Court of Appeals recognized, "[b]ased on this [Landy] study, the District Court determined in its memorandum opinion of July 24, 1992, that a higher score on the PCT is likely to result in better job performance, and that therefore the test results could be used to select new firefighters in order of their PCT scores." 1 F.3d

at 396; App. 20. Thus, using evidence from the August, 1987 study the trial court "modified its May 21, 1987 preliminary order to allow the City to hire firefighters in strict rank order from a single list comprised of males and females." *Id.* Not one female applicant was being "injured" or discriminated against in 1989 simply because final judicial approval of rank order hiring had not yet been obtained. After all, the entire firefighter selection process since 1986 was done under District Court supervision!

Nowhere is there any evidence to support Petitioners' twisted view that "ranking on the firefighter test discriminated against women" when, in February, 1989, the consent decree was imposed. The most that can be said is that the District Court had not held a hearing and announced a conclusion on the use of Dr. Landy's new test to rank order the candidates by their scores; yet the same written Report and testimony by Dr. Landy produced exactly that result in 1992. Of course, the Petitioners then go on to contend that the "validity of ranking is irrelevant to whether or not the consent decree is constitutional," but this further demonstrates the weakness of their contradictory positions. Petitioners rewrite history to argue that the 1987 Landy study, done in sufficient depth and detail to be filed at the District Court, was merely illusory. They ignore the 1992 holding of the District Court that the Landy Report was very thorough, mischaracterizing it as merely "an after-the fact finding that ranking is valid." Petition at 23. Such manipulated analysis of the factual Record furnishes no reason to grant the Writ.

III.

The third Question raised by the Petitioners concerns Respondents' standing to sue and is similarly fact driven.[4] The consent decree was solely the product of private negotiations between the City and Petitioners. The District Court entered the consent decree without any formalities such as notice, factual findings, or a public hearing. App. 132. Instead, it was quietly adopted "without any consideration to the impact of the consent decree on the rights of male firefighter applicants." App. 134. In the wake of this Court's decision in *Martin v. Wilks*, 490 U.S. 755 (1989), Respondents filed both a Rule 60(b) Motion in *Brunet* I and a new lawsuit seeking modification of the consent decree. The District Court rejected the City's efforts to buy-off the claims of the named plaintiffs and found standing appropriate for all of them under, among other cases, *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980).[5]

---

[4] Petitioners' placement of the standing issue last, which under Article III of the United States Constitution is very nearly the first issue in any case, is perhaps a self-indictment of the merit of this Question.

[5] Respondents reserve the opportunity to brief the standing grounds set forth by the District Court if Certiorari is granted. Additional trial court opinions not included in Petitioners' Appendix deserve review to fully understand the complex events which occurred once Guy Tucker and others announced their challenge. Likewise, Respondents would further argue an appropriate construction of this Court's recent Opinion in *Northeastern Florida Contractors v. Jacksonville*, ___ U.S. ___, 113 S. Ct. 2297 (1993), furnishes these Respondents' standing. *Jacksonville* is mentioned in passing by the Court of Appeals. 1 F.3d at 397; App. 24-25. However, it was announced only after oral argument in this case had occurred.

The Sixth Circuit concluded that, in any event, three out of four of the individual Respondents had standing because of a diminution in their relative seniority rights which arose to the extent that less-qualified female applicants had been hired before better qualified males. 1 F.3d at 401; App. 44-45. It is clear "[t]he women hired in the August, 1991 class achieved a higher place on the CDF's seniority hierarchy than they would have in the absence of the consent decree. [Petitioners' class members] Fox and Sachs would be less senior than [Respondents' class members including] Tudor, Meyer, and Hilleary if not for the consent decree." *Id.* Respondents' injury arose from having to compete under the Fire Division seniority system for tangible benefits such as vacation and promotions with Fox and Sachs who, because of their lower test scores, should not have occupied equivalent seniority positions with Respondents. The female firefighters achieved higher job seniority only by operation of the consent decree. The significance of such an injury results from the importance placed on seniority rights under the Fire Division collective bargaining agreement. *Id.* Thus, harm was clearly particularized and both conferred standing to sue and justified the remedial relief ultimately awarded Respondents.

Hoping to dress up this wholly factual inquiry with a legal twist, Petitioners suggest that this standing theory is somehow an expansion of the case law. The Sixth Circuit did not, however, announce any new theory of standing. Its opinion was only the direct application of *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), which recognized the importance of individual seniority rights in many American workplaces.

Petitioners also overlook, again, that resolution of this standing issue in their favor still does not foreclose the District Court's modification of the consent decree under *Rufo v. Inmates of Suffolk Co. Jail*, ___ U.S. ___, 112 S. Ct. 748 (1992). Thus, denial of standing for these Respondents would be a hollow achievement inasmuch as the same outcome is reached in the District Court's discretionary modification of the consent decree.

CONCLUSION

For the reasons stated, the Petition should be denied.

Respectfully submitted,

RICHARD A. FRYE
Counsel of Record
MARION H. LITTLE
JANINE M. DASCENZO
SCHWARTZ, KELM, WARREN
& RUBENSTEIN
41 South High Street, 23rd Floor
Columbus, Ohio 43215
(614) 222-3025

Supreme Court, U.S.
FILED
FEB - 4 1994
OFFICE OF THE CLERK

No. 93-1101

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ANN BRUNET and DENISE SACHS,
on behalf of themselves and the class they represent,
Petitioners,

and

GUY E. TUCKER, JAMES T. MEYER,
STUART J. TUDOR, and JOSEPH S. HILLEARY,
on behalf of themselves and the class they represent,
Respondents,

v.

CITY OF COLUMBUS, OHIO, COLUMBUS
CIVIL SERVICE COMMISSION, DANA RINEHART,
ALPHONSE MONTGOMERY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION OF CITY OF COLUMBUS, et al.

RONALD J. O'BRIEN
Counsel of Record
DOUGLAS K. BROWELL
CITY OF COLUMBUS, OHIO
90 W. Broad St., Rm. 200
Columbus, Ohio 43215
(614) 645-7385

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 4

I. THE SIXTH CIRCUIT'S USE OF THE STRICT SCRUTINY STANDARD WAS NOT ERROR 4

II. THE FACTS OF THIS CASE DID NOT SUPPORT THE CONTINUATION OF A GENDER PREFERENCE DECREE 7

III. INTERVENORS' INJURY WAS SUFFICIENT TO CONFER STANDING 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES **PAGE**

Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993) 3, 5, 7, 9

Brunet v. Columbus, 642 F.Supp. 1214 (S.D. Ohio 1986), *appeal dismissed as moot*, 826 F.2d 1062 (6th Cir. 1987), *cert. denied* 485 U.S. 1034 (1988) 1

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 4-6

Contractors Ass'n. of Eastern PA v. Philadelphia, 735 F.Supp. 1274, 1304 (E.D. PA 1990), *vacated on other grounds*, 945 F.2d 1260 (3rd Cir. 1991), subsequent opinion, 6 F.3d 1990 (3rd Cir. 1993) . . . 6

Coral Construction Co. v. King County, 941 F.2d 910, 931-932 (9th Cir. 1991), *cert. denied* ____ U.S. ____, 112 S.Ct. 875 (1992) 6

Kirchberg v. Feenstra, 450 U.S. 455 (1981) 5

Michigan Road Builders Ass'n. v. Milliken, 834 F.2d 583, 595 (6th Cir. 1987) 6

Mississippi University for Women v. Hogan 458 U.S. 718 (1982) 5

Rufo v. Inmates of Suffolk County Jail, ____ U.S. ____, 112 S.Ct. 748 (1992) 6

Wygant v. Jackson Board of Education,
476 U.S. 267 (1986) 5

STATUTES AND OTHER AUTHORITIES

42 U.S.C. § 1983 . . . . . 1, 2

42 U.S.C. § 2000e 1

United States Constitution,
Fourteenth Amendment 2

STATEMENT OF THE CASE

Petitioners filed the original action in this case in 1984 alleging that the City's entry-level firefighter examination illegally discriminated against them on the basis of gender in violation of both 42 U.S.C. § 2000e and 42 U.S.C. § 1983.

The City had administered a two part examination that consisted of a cognitive ability test (CAT) and physical capability test (PCT). Following a court trial in 1986, the District Court judge found that the City had not engaged in intentional discrimination under 42 U.S.C. § 1983, but that the PCT violated Title VII due to its adverse impact against women and the City's failure to establish that all components of the PCT were job related. *Brunet v. Columbus,* 642 F.Supp. 1214 (S.D. Ohio 1986), *appeal dismissed as moot*, 826 F.2d 1062 (6th Cir. 1987), *cert. denied* 485 U.S. 1034 (1988) (hereinafter *Brunet I*).

During this litigation five firefighter classes were delayed. The trial court required an extensive, expensive study to be completed by the City to comply with its orders and the City's charter which required competitive examinations and the use of the "Rule of Three" to hire from a rank ordered eligible list of applicants. *Brunet I, supra* at 1250-1253. Eventually, the trial court approved a modified PCT and permitted the City to hire firefighters from an eligible list derived from such tests provided that the City hired male and female applicants in proportion to the number of males and females achieving passing scores.

Both the City and Petitioners appealed the trial court's determination regarding the validity of the examination and the City remained enjoined from using its now valid

examination to hire in rank order pursuant to its charter.

After almost five years of litigation, including one closed appeal to the Sixth Circuit which was dismissed as moot and *certiorari denied*, another appeal and cross-appeal to the Sixth Circuit, a contempt motion in the trial court where a hearing had been held, claims for attorney fees near 1/2 million dollars, claims for back pay and other remedial relief by named plaintiffs, $200,000.00 in employment consultant fees to develop the fire examination and to comply with the trial court's orders, the City's mayor requested that the entire matter be resolved so that the City and its Fire Division could move forward on other issues.

Settlement discussions continued for three months including three status conferences with the trial judge. Eventually a proposed order was generated which the City neither agreed to nor signed - but regarding which the City only agreed not to appeal in the event the court entered such order. The trial court reviewed, signed and filed the proposed order without hearing on February 27, 1989.

In July, 1991 the Intervenors filed an action alleging that the February 27, 1989 order violated the Fourteenth Amendment and 42 U.S.C. § 1983. Two temporary restraining orders were issued by the trial court and both were stayed by the Court of Appeals.

Subsequently, the trial court held an evidentiary hearing and on March 18, 1992 found that ¶12 of the February 27, 1989 order violated the Equal Protection Clause of the Fourteenth Amendment in that the proportional hiring requirement constituted intentional discrimination against male applicants.

The trial court indicated it desired additional evidence on the issue of rank ordering from the PCT scores. Subsequently another evidentiary hearing was conducted on May 21, 1992 and through an order dated July 24, 1992 the District Court found that the firefighter entry level examination was job related, that it fairly and effectively predicted job performance and that it was sufficiently precise to be used to select candidates in order of their scores. (App. 125).

The trial court later issued an order adjusting the seniority of the male firefighters hired pursuant to the 1990 firefighter examination to provide the male applicants with complete relief for the injuries suffered as a result of the discrimination as found by the court.

Petitioners filed appeals from the March 18, 1992; July 24, 1992; and September 23, 1992 orders. The Court of Appeals affirmed the trial court's determinations with the exception that it reversed and remanded on the issue of whether the PCT and CAT should be weighted equally, although the appeals court indicated that the issue may have been addressed in the voluminous record and the court was unable to find it. *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993) (hereinafter *Brunet II*) (App. 91-92 at note 10).

Petitioners have subsequently petitioned this Court for a *writ of certiorari*.

SUMMARY OF THE ARGUMENT

Petitioners present no issues upon which this Court should issue the Writ. While the Court of Appeals correctly required the "strict scrutiny" doctrine in its decision, whether it had applied the "intermediate" standard instead, the court would have reached the same conclusion and correctly affirmed the trial court's decision. Further, the facts revealed that the unintentional discrimination against women had been adequately remedied. Therefore, there was insufficient basis to continue the hiring preference. Lastly, the injury to Intervenors was sufficient to give the Intervenors standing due to the fact that the seniority bestowed upon the Petitioners would not have been the same as the Intervenors but for the gender preference contained in the decree.

I. THE SIXTH CIRCUIT'S USE OF THE STRICT SCRUTINY STANDARD WAS NOT ERROR.

The Petitioners maintain that the Court of Appeal's application of the "strict scrutiny" standard gives rise to a conflict with other circuit decisions and decisions of this Court. However, in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) this Court held that race-based set-aside program established by municipalities are subject to "strict scrutiny"; the purpose of which "...to 'smoke out' illegitimate uses of race....*Id.* at 493. This Court in *Croson* further recognized that "...searching judicial inquiry..." and "...close examination of legislative process..." are to be engaged in "...when reviewing classifications based on race or gender *Id.* at 493, 495 (emphasis added).

This Court also held in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) that:

> "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure it does not conflict with constitutional guarantees." *Id.* at 274 citing *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

The Court of Appeals appropriately relied on *Croson, supra* and *Wygant, supra* to apply the strict scrutiny standard to an affirmative action plan based on a gender classification.

The Court of Appeals also appropriately distinguished between what Petitioners argued to be a "gender conscious plan" which the Court of Appeals determined would be subject to an intermediate standard of review and a "gender preference plan" which required the strict scrutiny standard of review. In this instance, the Court of Appeals properly found that the trial court's decree contained a gender preference and therefore must be subject to strict scrutiny. *Brunet II* (App. 54-55).

While Petitioners argue that this Court's holding in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) requires the intermediate standard to be applied, this Court in that case described the burden to be carried as one of "exceedingly persuasive justification." *Id.* at 724 citing *Kirchberg v. Feenstra*, 450 U.S. 455 (1981). While the distinction between strict scrutiny and intermediate scrutiny standard may be critical in other cases, the factual record in this matter is such that the outcome would have been the same using either standard.

Under either the strict or intermediate scrutiny standard, the question is whether there existed identifiable, actionable discrimination sufficient to justify an otherwise impermissible classification. *See Coral Construction Co. v. King County*, 941 F.2d 910, 931-932 (9th Cir. 1991), *cert. denied* ____ U.S. ____, 112 S.Ct. 875 (1992); *Contractors Ass'n. of Eastern PA v. Philadelphia*, 735 F.Supp. 1274, 1304 (E.D. PA 1990), *vacated on other grounds*, 945 F.2d 1260 (3rd Cir. 1991), subsequent opinion, 6 F.3d 1990 (3rd Cir. 1993). The Sixth Circuit's pre-*Croson* decision in *Michigan Road Builders Ass'n. v. Milliken*, 834 F.2d 583, 595 (6th Cir. 1987), embraced this premise as well. In light of the *Croson* decision and other applicable precedents from this Court any preference must be premised upon continuing or past discrimination left unremedied. This principle is supported not only by the Sixth Circuit's decision here and in *Michigan Road Builders, supra* but also in the Ninth Circuit's *Coral* decision which is relied upon by the Petitioners. As a result there is actually no disagreement between the circuits and therefore this Court should not grant the Writ.

Significantly, the Petitioners fail to address the legitimate exercise of the District Court's discretion in re-examining injunctive orders. In *Rufo v. Inmates of Suffolk County Jail*, ____ U.S. ____, 112 S.Ct. 748 (1992), this Court held that a district court retains discretion in connection with re-examining injunctive orders. In this instance, the trial court recognized and exercised its proper authority. Petitioners failed to address the critical element of the exercise of the district court's discretion under *Rufo, supra* in any of the questions presented.

II. THE FACTS OF THIS CASE DID NOT SUPPORT THE CONTINUATION OF A GENDER PREFERENCE DECREE.

The second question presented by Petitioners relates to whether sufficient facts exist to support the continuation of the proportional hiring requirement. The courts below have determined the continuation of the gender preference contained in the February, 1989 decree was not justified as a remedy for past discrimination based on the facts of this case.

Although the City disagreed with the District Court's findings that the City's conduct constituted intentional discrimination, the Court of Appeals affirmed the district court's holding on this issue.

Petitioners however, go too far in zealously presenting their case when they assert that "... as of the date of the consent decree, ranking on the firefighter test was discriminatory" petition at 23 and 15, note 7. While there is no question that in February, 1989 the district court had not yet approved the use of the City's new firefighter examination for rank order hiring, that does not mean that the test necessarily was "discriminatory."

The Court of Appeals recognized that evidence based on the 1987 Landy study demonstrated that "... a higher score on the PCT is likely to result in better job performance and that therefore the test results could be used to select new firefighters in order of their PCT scores." *Brunet II* at 396; App. 20. There is no evidence in the record to support petitioner's allegation that rank ordering on the firefighter test discriminated against women when the February, 1989 decree was entered.

The facts of record in this matter furnish no valid reason to grant the Writ.

III. INTERVENORS' INJURY WAS SUFFICIENT TO CONFER STANDING.

In short, Petitioners argued that Intervenors did not demonstrate sufficient injury for the purposes of standing. Petitioners charge that there is no evidence in the record of injury to the Intervenors. However, it is clear that the women hired in August, 1991 achieved a higher level of seniority than they would otherwise have in the absence of the decree. The court of appeals effectively and succinctly explained the harm:

> Fox and Sachs would be less senior than Tudor or Meyer and Hilleary if not for the consent decree. Hiring Fox and Sachs, whose test scores were lower than those of any of the *Tucker* plaintiffs, diminished the employment status of Tudor, Meyer and Hilleary. This is because Fox and Sach enjoy the same "competitive status" seniority right as Tudor and Meyer, and greater rights than Hilleary. Tudor and Meyer have lost the advantage of having more seniority points than the women in future competition for promotion. They are harmed by having to compete on equal footing with persons who do not belong in their class. Hilleary has not only lost that advantage, but has been put at a disadvantage because he is less senior than Fox and Sachs. Moreover, when the City expanded the class from 36 to 38 Tudor and Meyer were put in the position of having to compete with two additional persons, and

Hilleary, who was hired in the next class was junior to two more people than he would have been in the absence of the consent decree. *Brunet II* at 401; App. 43, 44.

Petitioners simply disagree that there is sufficient injury. They fail to demonstrate that the Court of Appeals holding in this regard is in conflict with other Circuit decisions or Supreme Court decisions. Therefore, Petitioners have failed to demonstrate a basis for granting the Writ.

CONCLUSION

For the foregoing reasons, Respondents respectfully urge this Court to deny the Petition.

Respectfully submitted,

CITY OF COLUMBUS
DEPARTMENT OF LAW

Ronald J. O'Brien
Counsel of Record
City Attorney

Douglas K. Browell
Chief Labor Attorney
City Hall, 90 W. Broad St.
Columbus, Ohio 43215
Phone: (614) 645-7385

Attorneys for Respondents

Supreme Court, U.S.
FILED
FEB 16 1994
OFFICE OF THE CLERK

(5)

CASE NO. 93-1101

THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1993 TERM

Ann Brunet and Denise Sachs, on behalf of themselves and the class they represent,
Petitioners,

and

Guy E. Tucker, James T. Meyer, Stuart J. Tudor, and Joseph S. Hilleary, on behalf of themselves and the class they represent,
Respondents,

v.

City of Columbus, Ohio, Columbus Civil Service Commission, Dana Rinehart, Alphonse Montgomery,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Alexander M. Spater
Counsel of Record
Kathaleen B. Schulte
SPATER, GITTES, SCHULTE & KOLMAN
723 Oak Street
Columbus, Ohio 43205
614/221-1160
Attorneys for Petitioners

TABLE OF CONTENTS

Argument

I. The Use of the Strict Scrutiny Standard in this Case Is Error, in Light of the Adoption by this Court and the Second, Fourth, Ninth, and District of Columbia Circuit Courts of Appeal of the Intermediate Standard for Gender Bias Cases. 1

II. The Court of Appeals Contravened the Holdings of this Court and Other Federal Appellate Courts by Holding That the Total Exclusion of Women Firefighters, the Use of Discriminatory Testing Procedures Between 1980 and 1986, and the Gross Disparity Between the Female Applicant Pool and Women on the Job Did Not Support a Gender Conscious Consent Decree. 4

III. The Singular Fact That the Male Intervenor-Respondents Were Hired at the Same Time as Were the Female Petitioners Is Not Sufficient Injury under Article III to Confer Standing on Them Individually and to Allow Them to Represent the Unnamed Members of the Class. 6

Conclusion 8

TABLE OF AUTHORITIES

Brunet v. City of Columbus, 642 F.Supp. 1214 (S.D. Ohio), *appeal dismissed as moot,* 826 F.2d 1062 (6th Cir.), *cert. denied,* 485 U.S. 1034, 108 S.Ct. 1593 (1988) 5

City of Richmond v. J. A. Croson Co., 488 U.S. 469, 109 S.Ct. 706 (1989) 3, 8

Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849 (1971) 5

Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331 (1982) 1

Northeastern Florida Contractors v. Jacksonville, __ U.S. __, 113 S.Ct. 2297 (1993) 7

Regents of the University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733 (1978) 7

Rufo v. Inmates of Suffolk Co. Jail, __ U.S. __, 112 S.Ct. 748 (1992) 3, 4, 7, 8

I.

Respondents Guy E. Tucker, *et al.* and City of Columbus, *et al.* (hereinafter Respondents)[1] urge this Court to ignore the conflict among circuits as to the appropriate standard of scrutiny to be applied to gender based discrimination cases and this Court's prior holding in *Mississippi University for Women v. Hogan,* 458 U.S. 718, 102 S.Ct. 3331 (1982), establishing the use of the intermediate standard in cases of gender bias under the Fourteenth Amendment. Petitioners submit that the conflict cannot be ignored, and the Court is obliged to address this issue.

Respondents do not disagree with Petitioners that there is a conflict among the Circuits in the standard for proving that a gender-based affirmative action decree is valid. Instead, they argue that under any standard of scrutiny, the 1989 consent decree would not be upheld. Respondents are wrong. First, it is impossible to predict how lower courts would have evaluated the evidence if the courts had used the intermediate standard; i.e., if they had looked at whether there was a substantial relationship between the minimal affirmative action decree in the case at bar (hiring 2% - 5% women) and the objective of reducing the undoubted underrepresentation of women in the Columbus Division of Fire. Second, respondents ignore the evidence in the record below of past and

---

[1] Where necessary for clarity, petitioners will refer to the *Tucker* respondents as intervenor-respondents.

continuing discriminatory selection procedures. Indeed, respondents do not dispute any of the facts of prior discrimination which support the 1989 consent decree.

For example, although it is undisputed that the City had in place a written policy excluding women from applying to become firefighters until nine years before the underlying litigation was filed, the court of appeals found this evidence too remote. Even though the evidence was undisputed that after the City was required to allow women to apply for the job, it began a more strenuous testing procedure which systematically removed women from consideration (and it is undisputed that the City knew this would be the effect), the court of appeals isolated this evidence from the prior written policy against women and found that this discrimination had been remedied.

There was also undisputed evidence that there was manifest imbalance of women firefighters in comparison to those who were qualified for the job. The manifest imbalance resulted from the past policy excluding women from the position of firefighter and tests that discriminated against women. Federal courts, including this Court, have routinely relied on such evidence in upholding affirmative action. The lower courts in the case at bar, by ignoring evidence of past discrimination that caused the imbalance of women in the firefighter workforce, required a much more onerous burden to justify the affirmative action than has been required by courts which have used either the intermediate or strict scrutiny standards.

Contrary to the court of appeals' characterization of the evidence, it is apparent that the long term effect of the exclusionary and discriminatory practices of the respondents resulted in the manifest imbalance. Petitioners submit that even under strict scrutiny, the evidence of past discrimination is sufficient to uphold the 1989 consent decree.

Finally, respondents suggest that *Rufo v. Inmates of Suffolk Co. Jail*, __ U.S. __, 112 S.Ct. 748 (1992), stands for the proposition that a district court may apply any standard of scrutiny it desires because it retains absolute discretion and power to modify institutional reform consent decrees, and accuse petitioners of failing to address this "essential element of this litigation." Indeed, respondents tend to rely on this "significant discretion" under *Rufo* for every argument they advance.

Petitioners have not, as suggested, ducked an essential element. *Rufo* has no application in this case for two reasons: the holding and Rule 60(B) (which it interprets) mandate that a request for modification be brought by a party to the consent decree, not an intervenor or other third party; and secondly, respondents have failed at any time in this litigation to meet the threshold burden of *Rufo*, namely a showing "that a significant change in circumstances warrants revision of the decree."

The only intimation in the record of a change in circumstances is the district court's suggestion that "[a]fter the decision in *Croson*, the invalidity of the decree should have been obvious to the City." Opinion and Order of March 18, 1992, App. at 141.

Petitioners submit that this Court's decision in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706 (1989) was not the type of "significant change" referred to in *Rufo, supra*:

> To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation. . . .

Id., 112 S.Ct. at 763.

Petitioners submit that *Rufo* cannot be read so broadly as to do away with this Court's requirements for affirmative action consent decrees.

II.

Respondents argue that petitioners have rewritten the facts in the record. As previously stated, they fail to refute a single fact presented by petitioners in support of the 1989 consent decree.

Respondents do dispute the assertion that at the time of the consent decree strict rank order selection discriminated against women. Respondents, however, ignore that an injunction against strict rank order selection from the Columbus firefighters list was entered by the district court in 1986 because it

discriminated against women.[2] That injunction was in effect at the time the consent decree was signed by the lower court. Furthermore, it is uncontradicted that rank order selection from the firefighter test in 1989 (at the time of the consent decree) had an adverse impact on women and had not been shown to be job related. Therefore, under the standards in force since *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849 (1971), rank order selection discriminated against women.

Two points must be made here: rank order selection has no bearing on the lower courts' overturning of the consent decree because it was not a basis nor a factor in the determination. Indeed, although most of the evidence presented at hearing on the constitutionality of the consent decree went to rank ordering, the district court specifically did not determine the validity of rank order selection and struck down the consent decree on other grounds. Secondly, if this Court reverses the lower courts' decisions on the constitutionality of the consent decree, the after-the-fact finding in 1992 that rank order selection is job related will not disturb the consent decree.

Contrary to the respondents' assertions below, the availability of a job related testing procedure does not negate a legally enforceable affirmative action consent decree. Normally, the parties do not go to the expense and time to validate procedures once a

---

[2] *Brunet v. City of Columbus,* 642 F.Supp. 1214, 1250, 1253 (S.D.Ohio), *appeal dismissed as moot,* 826 F.2d 1062 (6th Cir.), *cert. denied*, 485 U.S. 1034, 108 S.Ct. 1593 (1988).

consent decree is entered. However, even where such has occurred, it will not overcome the legitimacy of the consent decree.

III.

Respondents bring very little new to the standing issue raised by petitioners. Two points, however, require response.

First, respondents argue that important seniority rights were diminished by the consent decree, and therefore standing existed for three of the four intervenor-respondents, abandoning the argument that the fourth was likewise injured.

The evidence in the record regarding seniority is contained in the Joint Stipulations from the December, 1991 hearing on the intervenor-respondents attack on the consent decree. That stipulation reads in its entirety:

> Seniority within the Division of Fire is determined by date of appointment. This is important in any firefighter's career for a number of reasons including pay, pensions, vacation time, "Kelly Day" (or days-off work) selection, and promotions. Seniority points are awarded for years of service, which are then added to a firefighter's competitive score on promotion examinations; in case of a tie or close finish the more senior person obtains the promotion.

Joint Stipulation No. 10.

In view of this seniority policy, the evidence below is even more striking. It was undisputed that the intervenor-respondents' hire dates were unaffected by the consent decree. That is, in the total absence of the consent decree's hiring requirement, each of the intervenor-respondents would have been and, in fact, were hired on the same date due to their placement on the eligibility list. Thus, their seniority dates, and all rights and benefits derived from the dates, were unaffected by the consent decree.

The court of appeals, in an expansion beyond standing jurisprudence, found that despite this fact, intervenor-respondents suffered a dimunition in competitive status because women were hired along with the intervenor-respondents. This, the court of appeals held, was sufficient "injury" to confer standing.

Petitioners are unaware of any case by this or any other court which has found standing on similar facts. In *Northeastern Florida Contractors v. Jacksonville*, __ U.S. __, 113 S.Ct. 2297 (1993), this Court found that white contractors had standing to attack a minority set aside program because they alleged a denial of consideration for public contracts. Similarly, in *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978), this Court held that a white student who was denied consideration for a position in medical school as a result of an affirmative action plan had standing to challenge the plan. Neither of these cases support the court of appeals' sweeping holding.

Additionally, respondents rely on *Rufo* again for the suggestion that there is no longer a need to show

standing, in light of the district court's discretion to modify consent decrees. Such a sweeping interpretation of this case is once again ill-advised.

Unlike the sheriff in *Rufo*, the intervenor-respondents were not parties to the consent decree. Thus, neither *Rufo* nor Rule 60(b) confers on them the right to seek modification of the consent decree. Neither of the parties to the consent decree sought modification at any time prior to the lower court's finding that the consent decree was unconstitutional.

Secondly, respondents have pointed to no significant change to warrant modification, regardless of their lack of status in this matter. This Court made clear in *Rufo* that the threshold requirement is a showing "that a significant change in circumstances warrants revision of the decree." *Id.*, 112 S.Ct. at 760. While this may be done by showing a "significant change in factual conditions or in the law," *id.*, neither have been advanced in the case at bar. This Court's holding in *Rufo* remains inapplicable to these proceedings.

CONCLUSION

Respondents attempt to cast petitioners' arguments as a wholly factual dispute. While evidence is a key to this petition, it is the sufficiency of the evidence of discrimination, in light of *Croson* and its progeny, which mandate this Court's review and reversal. Unless this Court is satisfied that no affirmative action hiring plan can be supported under *Croson*, this important issue must be addressed to

rectify the wrongs herein and to provide guidance to the lower federal courts concerning such matters.

For all of these reasons, petitioners respectfully urge that this Court grant their petition and hear it on its merits.

Respectfully submitted,

Alexander M. Spater
Counsel of Record

Kathaleen B. Schulte
SPATER, GITTES, SCHULTE & KOLMAN
723 Oak Street
Columbus, Ohio 43205
(614) 221-1160

Attorneys for Petitioners